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IN THE

SUPREME COURT OF THE UNITED STATES

SUE HARRIS DEBAUCHE,

Petitioner,

v.

EUGENE TRANI, et al.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX
Volume I of II

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Civil Action No. 98-1658

SUE HARRIS DEBAUCHE,
Plaintiff-Appellant,

v.

EUGENE TRANI; LAWRENCE DOUGLAS WILDER; CLEAR CHANNEL RADIO, INCORPORATED, t/a WRVA, a Nevada Corporation; CENTRAL VIRGINIA EDUCATIONAL TELECOMMUNICATIONS CORPORATION, t/a WNVT,
Defendants-Appellees,

and

VIRGINIA COMMONWEALTH UNIVERSITY,
Defendant.

ACLU FOUNDATION OF VIRGINIA,
Amicus Curiae.

Civil Action No. 98-2517

SUE HARRIS DEBAUCHE,
Plaintiff-Appellant,

A2

v.

LAWRENCE DOUGLAS WILDER; CLEAR CHANNEL RADIO, INCORPORATED, t/a WRVA, a Nevada Corporation;

CENTRAL VIRGINIA EDUCATIONAL TELECOMMUNICATIONS CORPORATION, t/a WNVT,
Defendants-Appellees,

and

VIRGINIA COMMONWEALTH UNIVERSITY; EUGENE TRANI,
Defendants.

ACLU FOUNDATION OF VIRGINIA,
Amicus Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond
James R. Spencer, District Judge.
(CA-97-770-3)

Argued: March 3, 1999

Decided: September 15, 1999

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge

Widener joined. Judge King wrote a separate opinion, concurring in part and dissenting in part.

COUNSEL

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ON BRIEF: Thomas Stephen Neuberger, THOMAS S. NEUBERGER, P.A., Wilmington, Delaware; John W. Whitehead, Stephen H. Aden, THE RUTHERFORD INSTITUTE, Charlottesville, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Ashley L. Taylor, Jr., Deputy Attorney General, Ronald C. Forehand, Senior Assistant Attorney General, William E. Thro, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant Trani. R. Hewitt Pate, HUNTON & WILLIAMS, Richmond, Virginia; Robert L. Brooke, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellees WNVT and WRVA. Roger L. Gregory, Laura M. Hillenbrand, WILDER & GREGORY, Richmond, Virginia, for Appellee Wilder. Randal M. Shaheen, Christopher F. Winters, ARNOLD & PORTER, Washington, D.C., for Amicus Curiae.

OPINION

NIEMEYER, Circuit Judge:

During the 1997 gubernatorial election campaign in Virginia, L. Douglas Wilder, a radio talk show host with radio station WRVA and former governor of Virginia, organized a political debate between the Republican and Democratic candidates for governor at Virginia Commonwealth University ("VCU"). The debate, dubbed "Debate Virginia," was broadcast on radio station WRVA and on television station WNVT, as well as on other stations. Because she was not invited to participate, Sue Harris DeBauche, the Virginia Reform Party candidate for governor, filed this action under 42 U.S.C. § 1983, alleging that the defendants violated her constitutional rights to free speech and equal protection.

The district court dismissed DeBauche's action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on various grounds as applicable to the several defendants, including sovereign immunity, qualified immunity, and the absence of "state action." The court also assessed a portion of defendants' attorneys fees and costs against both DeBauche and her attorneys based on the action's lack of merit.

For the reasons that follow, we affirm the district court's dismissal order but vacate the order shifting fees and costs for reconsideration in light of this opinion.

I

On October 15, 1997, a few weeks before the 1997 gubernatorial election in Virginia, DeBauche filed the complaint in this case under 42 U.S.C. § 1983, alleging that she had been

excluded from Debate Virginia in violation of her rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution. She named as defendants: VCU, where the debate had occurred; its president, Eugene Trani, both individually and in his official capacity; and Douglas Wilder, who initiated the debate by inviting the Republican and Democratic candidates to a radio debate. DeBauche requested a declaratory judgment that her rights had been violated, injunctive relief, and compensatory and punitive damages in an unspecified amount. After VCU and Trani filed a motion to dismiss, DeBauche filed an amended complaint to modify some of the allegations and to add as defendants the owners of the radio station and the television station which sponsored the debate: Clear Channel Radio, Inc., the owner of radio station WRVA ("WRVA"), and Central Virginia Educational Telecommunications, Inc., the owner of television station WNVT ("WNVT").

In her amended complaint, DeBauche alleged that in April 1997, Wilder invited Republican gubernatorial nominee, James S. Gilmore, III, and Democratic nominee, Donald S. Beyer, Jr., to a radio debate in which each could address the issues of the campaign and his record. Several months later, in July 1997, Wilder confirmed in writing "that negotiations were concluded relative to Debate Virginia" and that it would be "jointly sponsored" by WRVA, WNVT, and VCU. The amended complaint alleges that VCU and Trani offered, and Wilder accepted, VCU as a place to hold the debate and that VCU and Trani contributed "VCU personnel, staff and other resources to plan, promote, manage and execute the debate." As DeBauche characterized the roles of the parties, Wilder "served as convener and moderator of Debate Virginia," and all of the other defendants "co-sponsored, planned, promoted, managed, executed, and paid" for it. The debate took place on October 6,

1997.

After arrangements for the debate had been completed and three weeks before the debate, DeBauche became "duly qualified" with the State Board of Elections as the Reform Party candidate for governor, having been selected at a meeting of the Virginia Reform Party State Central Committee on September 14, 1997. Between September 15 and October 6, DeBauche alleged that she and other Reform Party members placed telephone calls to Wilder at various telephone numbers and to Debate Virginia at its toll-free number for the purpose of having DeBauche included in the debate. DeBauche also sent e-mails to Debate Virginia's website for the same purpose. DeBauche alleged that she received no responses to her inquiries and that all efforts to participate were unsuccessful. Shortly after the debate, DeBauche "made a written demand to the defendants VCU and Trani that they schedule a gubernatorial debate including all three candidates before the November 4, 1997, election," but VCU and Trani rejected this demand on October 24, 1997.

DeBauche alleged that Debate Virginia constituted a designated public forum at which she was entitled under the First Amendment to appear and to express her views and the views of the Reform Party. To that end, she purported to bring the action not only on her own behalf but also on behalf of "the individual members of [the Virginia Reform Party] and on behalf of the Party." Alternatively, she alleged that even if the debate was a nonpublic forum, she and the Reform Party members were discriminated against "without a reasonable basis." Specifically, she claimed that "[b]ut for the actions of the defendants" in not including her in Debate Virginia, she would have received "at least 15% of the statewide vote in the [1997] election."

In an attempt to satisfy the requirements of 42 U.S.C. § 1983, DeBauche alleged that VCU and Trani were "state actors" and that Wilder, WRVA, and WNVT "may fairly be said to be state actors because they worked jointly on Debate Virginia with the defendants VCU and Trani." She alleged that because Wilder, WRVA, and WNVT "have jointly engaged with state officials in the challenged actions, . . . they [were] acting under color of law."

DeBauche requested relief including: (1) a declaratory judgment that the defendants' actions deprived DeBauche, the Party, and the Party's members of constitutional rights, (2) an injunction barring the defendants from excluding DeBauche and "any other future Party candidate" from any future debate, (3) compensatory and punitive damages, and (4) attorneys fees. In addition, DeBauche asked the court to "review and consider" the results of the 1997 gubernatorial election to determine whether other equitable relief was warranted, including "declaring that [DeBauche] would have received 15% of the statewide vote" and directing that the State Board of Elections be joined "to certify [Virginia Reform Party] candidates . . . to be placed on the ballot in the next Virginia gubernatorial election."

The district court granted the defendants' motions to dismiss the amended complaint on April 13, 1998, on various grounds. At the outset, the court rejected the defendants' contention that DeBauche's claims were moot because "[i]t is more than conceivable that DeBauche as a Reform Party candidate for a political office will be excluded from a [future] debate including only Democratic and Republican candidates and involving a state university." The court concluded, however, that DeBauche lacked standing to assert claims on behalf of the Reform Party. With respect to the claims against the state actors, VCU and

Trani, the district court found that the claims were barred by the Eleventh Amendment. With respect to the claims against Trani in his individual capacity, the court found that DeBauche failed to allege sufficient state action and that Trani was entitled to qualified immunity. And finally, with respect to the private defendants, Wilder, WRVA, and WNVT, the court found that they were not state actors and that they were not sufficiently intertwined with state actors to make their conduct state action.

In a subsequent order, the district court also awarded defendants Wilder, WRVA, and WNVT attorneys fees and costs under 42 U.S.C. § 1988(b), in the amount of $48,477, concluding that DeBauche's claims against them were "without foundation" and "baseless and unreasonable." The court also ordered that DeBauche's counsel be jointly and severally liable under 28 U.S.C. § 1927, in the amount of $37,859, for the awards made to WRVA and WNVT. The court inferred bad faith on the part of DeBauche's attorneys because "it was evident that DeBauche was tying the private broadcasting defendants with a tenuous string to Virginia Commonwealth University in order to show they were exhibiting state action." The court observed that the liability for DeBauche's attorneys was particularly appropriate "in light of DeBauche's [impecunious] financial situation and the Court's question as to how her lawsuit has been funded."

This appeal followed.

II

The district court dismissed the claims against VCU and against Trani in his official capacity as president of VCU on the basis that they were barred by the Eleventh Amendment. DeBauche

does not challenge the district court's decision as to VCU, but she does contend that Trani does not have Eleventh Amendment immunity from her claims for injunctive and declaratory relief because "official- capacity actions for prospective relief are not treated as actions against the State." Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985) (citing Ex parte Young, 209 U.S. 123 (1908)). The Ex parte Young exception, however, applies only when there is an ongoing violation of federal law that can be cured by prospective relief. It does not apply when the alleged violation of federal law occurred entirely in the past. See Green v. Mansour, 474 U.S. 64, 68 (1985) (observing that "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment"); Republic of Paraguay v. Allen, 134 F.3d 622, 627 (4th Cir. 1998) (noting that the Ex parte Young exception applies only when "(1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective" (citations omitted)).

In her amended complaint, DeBauche alleged that Trani conspired to keep her out of Debate Virginia in 1997 and that the defendants, including Trani, "will either individually or jointly sponsor, plan, promote, manage or hold statewide debates in the future from which candidates of the [Virginia Reform] Party will be excluded and to which only Democratic and Republican candidates will be invited." While we must, at this motion-to-dismiss stage of the case, accept as true the allegations of DeBauche's complaint, see Conley v. Gibson, 355 U.S. 41, 47-48 (1957), her allegations that she or Reform Party candidates will be excluded from future debates do not, as a matter of law, allege an ongoing violation of federally-protected rights. Instead, they amount to conjecture regarding discrete future events. Mere conjecture is insufficient to transform a one-time event into a continuing governmental practice or an ongoing violation. Accordingly, DeBauche's claim against Trani

in his official capacity does not fall within the Ex parte Young exception, and we have no reason not to apply the traditional principles of Eleventh Amendment immunity to dismiss the claims against Trani in his official capacity.

III

To the extent that DeBauche alleges that Trani, in his individual capacity, violated her constitutional rights, Trani is entitled to qualified immunity if his conduct involved performance of discretionary duties and did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Buõnocore v. Harris, 65 F.3d 347, 353 (4th Cir. 1995).

The constitutional violation alleged in this case arose from DeBauche's contention that she was excluded from Debate Virginia based upon the "content or viewpoint" expressed by her candidacy. Assuming solely for purposes of this argument that VCU and Trani, by providing the location for the debate, were in fact responsible for the selection of the participants and that the exclusion of DeBauche was viewpoint-based, Trani would nonetheless be entitled to qualified immunity because he could not have known at the time that such conduct was constitutionally prohibited. The question raised under these assumptions would be whether a candidate debate held by a state entity was a "public forum" such that viewpoint discrimination would be restricted by the Constitution.

This issue was decided for the first time in Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998), after Debate Virginia had taken place. In Forbes, which held that a decision to exclude a minor party candidate from a

debate sponsored by a public television station was subject to First Amendment review in a nonpublic forum category, the Court noted that it was carving out, for the first time, a "narrow exception to the rule" that public broadcasters' programming is generally not subject to scrutiny under the public forum doctrine. Id. at 675. Prior to Forbes, there was no clearly established constitutional prohibition on making content-based or viewpoint-based decisions on whom to include in publicly sponsored debates. Indeed, even under Forbes, a government-sponsored debate can exclude candidates as long as the exclusion is a"reasonable, viewpoint-neutral exercise of journalistic discretion." Id. at 683. And prior to Forbes, the Eleventh Circuit, in 1990, had upheld the decision of a Georgia public television station to include only the Republican and Democratic nominees, and to exclude the Libertarian Party nominees, in debates it was sponsoring, even though the court found that that decision was "content-based." Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486, 488-89 (11th Cir. 1990).

Because it was not clearly established in the fall of 1997 that the First Amendment restricted content-based or viewpoint-based decisions to exclude candidates from publicly sponsored debates, the district court correctly afforded Trani qualified immunity.

IV

The district court dismissed the private parties -- Wilder, WRVA, and WNVT -- because a claim under 42 U.S.C. § 1983 requires that the defendant be fairly said to be a state actor and DeBauche failed to allege facts that would have permitted the court to conclude that these defendants were state actors. We agree with the district court's conclusion.

DeBauche's complaint, which is based on 42 U.S.C.§ 1983, alleges that all of the defendants denied her federal constitutional rights under color of law because VCU and Trani were state actors and Wilder, WRVA, and WNVT were de facto state actors. She acknowledges that in April 1997, before VCU and Trani were involved, Wilder initiated the debate by inviting the Republican and Democratic gubernatorial candidates to a radio debate, but she contends that Wilder's later cooperation with VCU and Trani, who were concededly state actors, made his conduct state action. As she maintains, "VCU contributed substantial, extraordinary funding and other institutional resources to affect all aspects of Debate Virginia." As to the broadcasting companies, she states that "WNVT and WRVA engaged in unconstitutional political manipulation and viewpoint discrimination together with VCU and defendants Trani and Wilder . . . all in furtherance of a mutually beneficial state-sponsored and funded enterprise." From these allegations, she argues that the joint involvement of private and public bodies in discriminatory action, "even private action backed-up or endorsed by a public body, constitutes state action for purposes of the Fourteenth Amendment."

To implicate 42 U.S.C. § 1983, conduct must be"fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); see also Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (observing that § 1983's "under color" of law requirement is equivalent to the "state action" requirement of the Fourteenth Amendment (citing United States v. Price, 383 U.S. 787, 794 n.7 (1966))). The person charged must either be a state actor or have a sufficiently close relationship with state actors such that a court would conclude that the non-state actor is engaged in the state's actions. See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's

scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints"); Lugar, 457 U.S. at 941 (noting that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a `state actor' for purposes of the Fourteenth Amendment"); Adickes v. S. H. Kress & Co., 398 U.S. 144, 170-71 (1970) (holding that a private party that engaged in racial discrimination as part of a state-enforced custom would be a state actor for purposes of 42 U.S.C. § 1983). Thus, the Supreme Court has held that private activity will generally not be deemed "state action" unless the state has so dominated such activity as to convert it into state action: "Mere approval of or acquiescence in the initiatives of a private party" is insufficient. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). Stated differently, to become state action, private action must have a "sufficiently close nexus" with the state that the private action "`may be fairly treated as that of the State itself.'" American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 977, 986 (1999) (quoting Blum, 457 U.S. at 1004). And the establishment of the close nexus "depends on whether the State `has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State.'" Id.

DeBauche maintains that the joint participation of public and private actors in organizing and conducting Debate Virginia transformed the private actors' conduct into "state action," relying principally on Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (defining a "joint participation" test for finding state action). But DeBauche's argument does not account for the actual holding in Burton nor the Supreme Court's later refinements which explain what is required to

convert private action into state action. In Burton, a government agency leased space in a public parking garage to a restaurant that discriminated against blacks. The Court identified a symbiotic relationship in which "profits earned by discrimination not only contribute[d] to, but also [were] indispensable elements in, the financial success of a governmental agency." Id. at 724 (emphasis added). In the "peculiar facts [and] circumstances present" in Burton, id. at 726, the Supreme Court concluded that"[t]he State ha[d] so far insinuated itself into a position of interdependence" with the restaurant that the joint participation of public and private actors made the private party's conduct state action restricted by the Fourteenth Amendment. Id. at 725. That holding, however, certainly does not stand for the proposition that all public and private joint activity subjects the private actors to the requirements of the Fourteenth Amendment. See Blum, 457 U.S. at 1011; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974); see also Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting) (noting that Burton's holding was "quite narrow" and questioning its continuing viability). In its more recent discussion of the subject, the Supreme Court articulates the numerous limits to the joint participation test, noting that "Burton was one of our early cases dealing with `state action' . . . and later cases have refined the vague `joint participation' test embodied in that case." Sullivan, 119 S. Ct. at 988. Applying the principles elucidated and refined by the Supreme Court, we have recognized four exclusive circumstances under which a private party can be deemed to be a state actor:

> (1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private

> actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.

Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993). "If the conduct does not fall into one of these four categories, then the private conduct is not an action of the state." Id.

The facts alleged in DeBauche's amended complaint show that Wilder, a radio talk show host, first invited the Republican and Democratic candidates for governor to debate campaign issues on his radio talk show. When VCU offered to provide a place for the debate on its campus, Wilder accepted, so that, as finally arranged, Wilder "convened and moderated" the debate, which took place at VCU's campus and which was broadcast on radio and television by WRVA, WNVT, and other stations. The complaint alleged that all of the defendants "co-sponsored, planned, promoted, managed, executed and paid for" the debate.

However these facts are characterized, the arrangement described between the state actors and private actors does not transform the private actors' conduct into state action. As distinguished from Burton, DeBauche's amended complaint does not describe facts that suggest interdependence such that VCU relied on the private defendants for its continued viability. While the state actors, VCU and Trani, worked with Wilder in the organization and promotion of the debate, their conduct cannot be thought to have controlled his conduct to such an extent that his conduct amounted to a surrogacy for state action. Moreover, they did not control the stations which only agreed to broadcast the debate. More pertinently, when we

apply Andrews to these facts, we conclude that none of the four circumstances that we identified in Andrews exists in this case.

First, DeBauche has not alleged that VCU or any other arm of the state coerced any of the private defendants into committing an act that the state could not constitutionally undertake. The alleged unconstitutional act -- the failure to invite DeBauche to participate in the debate – resulted, according to DeBauche's amended complaint, from the initial, independent decision by Wilder to invite only Gilmore and Beyer to the debate. There is no suggestion that Wilder's decision to invite only them, or the stations' decision to broadcast the debate, was the result of coercion by VCU or Trani. In fact, the complaint states that the three private party defendants were "willful participants" in the organization of the debate.

The second Andrews circumstance is also not present in this case. DeBauche does not allege that VCU or any other state actor sought to evade a clear constitutional duty by delegating responsibility to a private party. First, there was no allegation of delegation. According to the complaint, Wilder decided on his own to host a debate and VCU offered, months later, to provide a site on its campus. VCU agreed to assist Wilder with his project, but there is no allegation that VCU delegated any of its governmental responsibilities to him or to the broadcast stations. Second, there are no allegations that suggest that VCU was using the private parties to evade a "clear constitutional duty." Indeed, nothing that was done regarding Debate Virginia violated any constitutional right that was clearly established at the time the debate was organized. See Part III, supra.

The third Andrews circumstance -- when "the state has delegated a traditionally and exclusively public function to a private actor" -- is present only when the function at issue is

"traditionally the exclusive prerogative of the State." United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 906 (4th Cir. 1995) (internal quotation marks and citations omitted) (holding that a private entity which organized a public festival held on public streets and sidewalks and supported in part with public money was not engaged in state action). This category is very narrow. See id. at 907. For example, the operation of a town has been held to be a function that is traditionally the exclusive prerogative of government. See Marsh v. Alabama, 326 U.S. 501 (1946). The hosting of political debates, conversely, is not within the exclusive prerogative of the government. While public broadcasters and state universities often sponsor such debates, so do private broadcasters and private universities. Indeed, hosting debates could never be the exclusive prerogative of the government because the First Amendment protects private parties' rights to put on (and select the content of) debates. See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569-70 (1995) (holding that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices"); Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994).

Finally, the fourth Andrews circumstance is completely irrelevant as DeBauche does not allege that VCU or any other arm of the state enforced any right of any of the private party defendants.

Because the allegations of DeBauche's amended complaint make it quite clear that the actions attributable to Wilder, WRVA, and WNVT amounted to their independently-motivated, private actions, rather than "state action," DeBauche fails to state a claim under 42 U.S.C. § 1983 against the private defendants for which relief can be granted.

See Fed. R. Civ. P. 12(b)(6).

V

Finally, DeBauche challenges the district court's order awarding attorneys fees and costs to Wilder, WRVA, and WNVT under 42 U.S.C. § 1988(b)[1] and holding her attorneys jointly and severally responsible for the fees and costs awarded to WRVA and WNVT under 28 U.S.C. § 1927.[2]

The district court found that DeBauche's attempt"to make [Wilder] a state actor because VCU only helped execute the debate was baseless and unreasonable." Similarly, the court concluded that DeBauche's suit against WRVA and WNVT was "without foundation."

These two broadcasters "were not even alleged to have played a role in the decision to exclude [DeBauche] from the debate." For these reasons, the court exercised the discretion

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1. Section 1988(b) provides in relevant part:

In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the cost

2. Section 1927 provides in relevant part:

Any attorney or other person admitted to conduct cases in any court . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

conferred by 42 U.S.C. § 1988(b) to award Wilder $10,618.20 in fees and costs; WRVA, $13,922.80; and WNVT, $23,935.70.

In addition to the award under § 1988, the court held DeBauche's attorneys jointly and severally liable for the awards made in favor of the two broadcast stations under 28 U.S.C. § 1927. The court noted that

> it was evident that DeBauche was tying the private broadcasting defendants with a tenuous string to Virginia Commonwealth University in order to show they were exhibiting state action. It was clear from the beginning that Wilder alone made the decision to exclude her from Debate Virginia and that the private defendants and the University were not in some collaboration about that Wilder decision.

The court concluded that DeBauche's attorneys' actions against the broadcast stations were "an unreasonable and intentional pursuit of a frivolous position which warrants an award under Section 1927, particularly in light of DeBauche's financial situation and the Court's question as to how her lawsuit has been funded."

DeBauche contends that the private defendants did not make "the necessary evidentiary showing" to justify an award under § 1988. In addition, she maintains that the § 1988 award was improper because the court did not consider her inadequate financial means to pay such an award. She provided the court with her income tax returns for the three years preceding the award, showing that in 1995 her adjusted gross income was $17,639; in 1996, $15,146; and in 1997, $8,982. As to the § 1927 award, DeBauche argues that the statutory requirements

that the proceedings be multiplied unreasonably and vexatiously could not be met as a matter of law because the conduct upon which the award was based was the mere filing of an amended complaint. We address these points in order.

A.

Section 1988(b) confers discretion on courts to award attorneys fees to the prevailing party in an action brought under, inter alia, 42 U.S.C. § 1983. When the prevailing party is the defendant, the attorneys fees should be awarded if the court finds "`that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" Hughes v. Rowe, 449 U.S. 5, 14 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). Stated otherwise, "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation," but there need not be any subjective bad faith on the part of the plaintiff. Id.

While we might be persuaded that the record does not show that DeBauche brought her action in bad faith, we cannot agree that the district court abused its discretion in finding her claim to be "groundless or without foundation." Both the Supreme Court and our court have been very clear about two relevant points of law: (1) the constitutional protections of free speech and equal protection apply only against governmental action, and not against private action, see Edmonson, 500 U.S. at 619; Hudgens v. NLRB , 424 U.S. 507, 513 (1976); Andrews, 998 F.2d at 216, and (2) the circumstances where a private party and a government are so intertwined that the private conduct can be considered "state action" for constitutional purposes are limited to a few defined circumstances, see Edmondson, 500 U.S. at 620; Andrews, 998 F.2d at 217. The Supreme Court has

stated that for a private party's decision to be considered"state action," there must be so much coercion or encouragement that "the choice must in law be deemed to be that of the State." Blum , 457 U.S. at 1004 (citations omitted).

The amended complaint that DeBauche filed makes it clear that the choice not to include DeBauche in Debate Virginia was made by Wilder, not by VCU, and it was not the product of any coercion by the state. Indeed, the invitations to the Republican and Democratic candidates were extended before VCU was even involved. DeBauche did allege significant involvement by the state in making a facility available and in helping to promote the debate, but this assistance to private parties does not transform the private parties' conduct into state action. We have articulated the four exclusive circumstances under which private conduct will be deemed "state action," noting that if conduct "does not fall into one of these four categories, then the private conduct is not an action of the state." Andrews, 998 F.2d at 217. Even though DeBauche could not fit her allegations into any of the four articulated circumstances she nevertheless pursued her action against the private parties, claiming that they violated her constitutional rights as state actors. In these circumstances, we cannot conclude that the district court abused its discretion in ordering the payment of fees and costs under § 1988.

DeBauche and the American Civil Liberties Union, as amicus, have suggested that ordering DeBauche to pay attorneys fees and costs will chill lawsuits by future individuals who feel that their constitutional rights have been violated. But "[w]hen a court imposes fees on a plaintiff who has pressed a `frivolous' claim, it chills nothing that is worth encouraging." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). In fact, in the circumstances of this case, it can just as easily be argued that

groundless lawsuits like DeBauche's might chill broadcasters' and journalists' exercise of their First Amendment rights in organizing political debates.

While we find no abuse of discretion in the decision to order DeBauche to pay fees and costs, we do believe that DeBauche's contention that her financial circumstances should be taken into account has merit. "The policy of deterring frivolous suits is not served by forcing the misguided [§ 1983] plaintiff into financial ruin simply because he prosecuted a groundless case." Arnold v. Burger King Corp., 719 F.2d 63, 68 (4th Cir. 1983). The record shows that DeBauche's combined income for the three years preceding her lawsuit was less than $42,000. Without more information about her resources or her backing for this lawsuit, it would appear that a $48,000 fee award against her would force her into "financial ruin." Because the district court does not appear to have taken into account the financial resources available to DeBauche, we must vacate and remand this part of the district court's judgment.

The defendants argue that the district court took DeBauche's financial means into account when it made her attorneys jointly and severally liable for a portion of the sanction. This, however, is not an appropriate way in which to take into account DeBauche's financial means because, under joint and several liability, she would still remain liable for the full amount of the award. If the court intended to split responsibility for paying fees and costs between DeBauche and her attorneys, it may do so on remand.

B.

DeBauche contends also that the imposition of sanctions jointly

and severally on her attorneys under 28 U.S.C. § 1927 is error as a matter of law because that provision does not cover the circumstances found by the district court. Section 1927 provides:

> Any attorney or other person admitted to conduct cases . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. The unambiguous text of § 1927 aims only at attorneys who multiply proceedings. It "does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law." Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980). Rather, this provision "is concerned only with limiting the abuse of court processes." Id. Thus, an attorney who files a meritorious claim and wins a substantial verdict may still be assessed sanctions under § 1927 if, during the case, he "multiplies the proceedings . . . unreasonably and vexatiously." Likewise, an attorney who files a meritless claim may not be sanctioned under§ 1927 if he does not engage in such conduct. Section 1927 focuses on the conduct of the litigation and not on its merits.

In this case, DeBauche's attorneys filed only two documents, a complaint and an amended complaint, and, as to WRVA and WNVT (for whose fees and costs they have been made responsible), they filed only one document, the amended complaint in which WRVA and WNVT were first made parties. We conclude as a matter of law that the filing of a single complaint cannot be held to have multiplied the proceedings

unreasonably and vexatiously and therefore that § 1927 cannot be employed to impose sanctions.

This is not to say, however, that the district court lacks authority to impose sanctions for the filing of a frivolous complaint. Federal Rule of Civil Procedure 11 allows sanctions against attorneys and parties who file pleadings that contain "claims [or] other legal contentions [that] are [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," or factual allegations that have neither evidentiary support nor the likelihood of forthcoming evidentiary support. Fed. R. Civ. P. 11(b)(2), (b)(3), (c).

Accordingly, we also vacate the sanctions imposed under § 1927 and remand to permit the district court to consider sanctions under Rule 11. Whether to impose Rule 11 sanctions, however, is committed to the discretion of the district court.

The judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KING, Circuit Judge, dissenting in part:

Sue Harris DeBauche, the Reform Party's 1997 candidate for Governor of Virginia, alleged that two highly influential employees of Virginia Commonwealth University conspired with others to exclude her from a broadcast debate featuring the Democratic and Republican gubernatorial candidates. According to the First Amended Complaint, VCU president Eugene Trani and Distinguished Professor L. Douglas Wilder were motivated by DeBauche's political views to discriminate

against her.

DeBauche's allegations, which must be taken as true at this initial stage of the proceedings, state a claim for relief against Trani and Wilder pursuant to 42 U.S.C. § 1983. By October 1997, it had been clearly established for at least twelve years that the First Amendment forbids the government to exclude from its forums those speakers with whom it disagrees, solely by reason of that disagreement.

Accordingly, I concur only in Part II of the majority's opinion, which affirms the district court's dismissal of DeBauche's claims against Trani in his official capacity. I dissent from (1) the majority's holding in Part III that Trani was entitled to qualified immunity with regard to the claims against him in his individual capacity; (2) the majority's affirmance in Part IV of the district court's dismissal of the claims against Wilder; and (3) the majority's conclusion in Part V that Wilder, WRVA, and WNVT may be entitled to attorneys' fees and court costs.[1]

I.

A.

We are, of course, compelled to view the facts alleged by DeBauche in the light most favorable to her. See Ostrzenski v.

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1. In addition to concurring in Part II of the majority's opinion, I agree with its affirmance in Part IV of the district court's dismissal of the claims against WRVA and WNVT, based on DeBauche's failure to sufficiently allege that the broadcasters engaged in state action. I also agree with the majority's holding in Part V that the filing of a complaint cannot support an award of sanctions under 28 U.S.C. § 1927.

Seigel, 177 F.3d 245, 251 (4th Cir. 1999) (citation omitted). The district court's dismissal of DeBauche's complaint pursuant to Fed. R. Civ. P. 12(b)(6) can therefore be sustained "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Moreover, in accordance with federal notice-pleading standards, we are bound to construe the complaint liberally. Anderson v. Foundation for Advancement, Educ. & Employment of Am. Indians, 155 F.3d 500, 505 (4th Cir. 1998) (citing Conley at 45-46).

The complaint alleges generally that "[t]he actions of the defendants with respect to Ms. DeBauches's [sic] request for access, participation and expression in Debate Virginia . . . were taken pursuant to the VCU's policies, customs and/or practices and were authorized . . . by the defendants or their agents functioning at a policy making level." First Amended Complaint [hereinafter FAC] at ¶ 56. "[T]he defendants . . . have discriminated against Ms. DeBauche without a reasonable basis and have unlawfully discriminated against her based on her viewpoint . . . ." FAC at ¶ 64. "[T]he defendants' policies, customs and/or practices favor the speech of candidates of the major political parties over speech of candidates from minority political parties and thereby invert cherished First Amendment values promoting dissent, an open electoral process, and free and uninhibited public debate of political questions." FAC at ¶ 71.

DeBauche specifically alleged that Trani was responsible for implementing VCU's policies, and that the enforcement of those policies in this case was achieved with the "active participation, knowledge and/or acquiescence" of Trani and the other defendants. FAC at ¶¶ 8, 68. Wilder, in particular, was alleged

to have "had a subjective appreciation that [his] acts would deprive Ms. DeBauche of her constitutional rights . . . ." FAC at ¶ 84.

B.

The preceding allegations clearly state a § 1983 claim against Trani and Wilder. Taking the averments in the complaint at face value, both defendants would be liable as a "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983.

The majority nonetheless affirms the district court's dismissal of DeBauche's complaint against these defendants, holding that (1) Trani is entitled to qualified immunity on the ground that he violated no clearly established constitutional right; and (2) Wilder was not, as a matter of law, a state actor. Ante at 7-8, 10-13. Both conclusions are, in my judgment, erroneous.

1.

The majority identifies the right sought to be vindicated in this case as the First Amendment's prohibition of "content-based or viewpoint- based decisions to exclude candidates from publicly sponsored debates." Ante at 9. According to the majority, our sister circuit's ruling in Chandler v. Georgia Pub. Telecomm. Comm'n , 917 F.2d 486 (11th Cir. 1990), and the Supreme Court's recent holding in Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998), rejecting arguments that third-party candidates must be included in political debates

sponsored by public television stations, preclude the possibility that DeBauche's right to be included in Debate Virginia was clearly established.

To the contrary, DeBauche's right to inclusion became clear more than five years prior to Chandler, with the Supreme Court's decision in Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985). Cornelius employed the analytical framework developed two years earlier in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), with respect to the"recurring and trouble- some issue of when the First Amendment gives an individual or group the right to engage in expressive activity on government property." Cornelius, 473 U.S. at 815 (Blackmun, J., dissenting).

Under Perry and Cornelius, it must first be determined whether the property to which the speaker desires access is a traditional public forum, a designated public forum, or a nonpublic forum. Perry, 460 U.S. at 45-46; Cornelius, 473 U.S. at 800, 802. If the forum is public, either by tradition or otherwise, speakers may only be excluded to serve a compelling governmental interest. Cornelius, 473 U.S. at 800. Conversely, if the forum is nonpublic (like Debate Virginia), restrictions on speech need only be reasonable in light of the property's intended purpose. Id. at 806. A speaker may properly be excluded from a nonpublic forum if, for example, she is not a member of the class of speakers for whose benefit the forum was created, or if she wishes to address a topic not within the purpose of the forum. Id.

Even in the case of a nonpublic forum, however, it is abundantly clear that a speaker may not be excluded on the basis of her viewpoint. As Justice O'Connor stated in Cornelius , "the government violates the First Amendment when it denies access

to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." Id. at 806. Moreover, "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." Id. at 811 (citations omitted).[2]

DeBauche alleged that Trani, acting on behalf of a state university, excluded her from Debate Virginia to prevent her from publicly expressing her political views. She was indisputably a member of the class of speakers, i.e., ballot-qualified candidates for the office of Governor of Virginia, for whom the forum was created. There is like- wise no dispute that DeBauche wished to speak on the same topics as her Democratic and Republican challengers. Consequently, under Cornelius, DeBauche stated a viable § 1983 claim upon which she must prevail if she can adduce sufficient proof that she was indeed discriminated against on the basis of her viewpoint.

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2. Cornelius involved a challenge by certain legal defense funds to their exclusion from the Combined Federal Campaign (CFC), an annual charity drive targeted at federal employees. The plaintiffs maintained that the prohibition against their participation in the CFC violated their First Amendment right to solicit charitable contributions. The Court held that the CFC was a nonpublic forum, and that the government could reasonably exclude controversial groups whose participation would disrupt the workplace and cause the drive to be less successful. The Court nevertheless remanded the case for the lower courts to determine whether the plaintiffs' exclusion was motivated by the government's desire to suppress their viewpoints.

Neither Chandler nor Forbes altered the basic rule of Cornelius. The debates at issue in those cases were organized and broadcast by state-owned television stations. Although Justice Kennedy's opinion in Forbes acknowledged some uncertainty as to whether the forum doctrine should apply in the "very different context of public television broadcasting," Forbes, 523 U.S. at 673, the Court ultimately decided that the doctrine should apply, at least with regard to political debates. Id. at 675 ("Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule.").

But even a broadcaster cannot do what Trani is alleged to have done in this case:

> [T]he requirement of neutrality remains; a broadcaster cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's views. Viewpoint discrimination in this context would present not a calculated risk, . . . but an inevitability of skewing the electoral dialogue . . . . The debate's status as a nonpublic forum did not give [the defendant] unfettered power to exclude any candidate it wished.

Id. at 676, 682 (citation, internal quotation marks, and brackets omitted); accord Chandler, 917 F.2d at 489 ("[W]e can safely predict that the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment.").

At bottom, neither VCU nor Trani is a broadcaster. There is no justification, then, for the majority's assertion that either Chandler or Forbes -- pertaining to broadcasters -- announced

the standard against which Trani was expected to measure his conduct. That standard was set much earlier, in Cornelius. Viewed in their proper con- text, Chandler and Forbes merely extended the rule of Cornelius to encompass the peculiar realm of public television and radio broad- casters that organize political debates.

It is no answer to say that Cornelius was not a debate case, and therefore has no application here. Cornelius was a forum case, and a political debate is perhaps the quintessential forum. The law requires that qualified immunity be denied government officials who transgress those rights "of which a reasonable person would have known." Edwards v. City of Goldsboro, 178 F.3d 231, 250 (4th Cir. 1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). A reasonable person in Trani's position would have been aware that Cornelius forbade the type of viewpoint discrimination in which he is alleged to have engaged.[3] Consequently, I must conclude that Trani is not entitled to qualified immunity on the face of the complaint.

2.

The majority asserts that Wilder, in his role as a radio personality and political figure, cannot be considered a state

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3. It is likewise immaterial that WRVA and WNVT were alleged to have participated in the decision to exclude DeBauche. Although these private broadcasters are not state actors and are thus impervious to this lawsuit, ante at 11-14 (citing Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214 (4th Cir. 1993)), Trani cannot cloak himself in their invulnerability. The mere happenstance that broadcasters are present on the periphery does not limit our consideration of the relevant precedents to Forbes and Chandler.

actor with regard to his involvement in Debate Virginia. The majority overlooks, however, that Wilder was also a contract employee of VCU. The materials submitted below reveal that Wilder was appointed in 1995 to the position of Distinguished Professor in VCU's Center for Public Policy. See Appendix to Plaintiff's Opposition to the State Defendants' Motion to Dismiss, at 16 (J.A. 57). Indeed, the record contains no fewer than eight letters pertaining to Debate Virginia that were drafted by Wilder or his staff on VCU's letterhead. During DeBauche's ongoing efforts to be included in the debate, she and other members of the Virginia Reform Party attempted to telephone Wilder at his VCU offices. FAC at §§ 46, 48.

Although the district court granted Wilder's motion to dismiss without considering any materials beyond the complaint, we are not bound to follow the same path. See McNair v. Lend Lease Trucks, Inc., 62 F.3d 651, 656 (4th Cir. 1995) (court of appeals has the discretion to note a critical fact contained in a document submitted to, but not considered by, the district court in ruling on a motion under Rule 12(b)(6), where the parties are aware that materials outside the pleadings are before the court), reasoning adopted by McNair v. Lend Lease Trucks, 95 F.3d 325, 328 n.3 (4th Cir. 1996) (en banc) (vacating remainder of panel decision).

Absent discovery, it is impossible to ascertain the extent to which Wilder acted on behalf of VCU with regard to the organization and administration of Debate Virginia. Insofar as Wilder was indeed attempting to further the interests of his university employer, he was plainly engaging in state action within the contemplation of § 1983, and is therefore potentially

liable to DeBauche.[4] The question cannot, in any event, be resolved as a matter of law on a motion to dismiss.

II.

Because I would reverse the district court's dismissal of DeBauche's § 1983 claim against Wilder, it follows that I would likewise reverse the concomitant award of fees and costs. Though I agree with the majority that WRVA and WNVT cannot be deemed state actors in this case, see supra note 1, I do not think that DeBauche's assertions to the contrary are so "groundless or without foundation" as to justify a fee award under § 1988(b). Ante at 16 (noting standard). Particularly in light of Wilder's professional association with WRVA, I would not discount the possibility that DeBauche could have credibly alleged that Wilder coerced the radio station to adopt his position with regard to DeBauche's exclusion from the debate, thereby satisfying the first Andrews scenario, see ante at 12 (noting that a private party may engage in state action where "the state has coerced the private actor to commit an act that would be unconstitutional if done by the state").[5]

III.

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4. For the reasons I have expressed supra in Section I.B.1., Wilder -- like Trani -- would not be entitled to qualified immunity on the facts as alleged by DeBauche.

5. Nor do I believe that sanctions pursuant to Rule 11 are appropriate in this case. Given the seriousness of the alleged conduct, the Supreme Court's consistent condemnation of viewpoint discrimination, and the unusual facts present here, DeBauche could make a nonfrivolous argument for the modification or extension of existing law to hold the broadcasters liable as state actors.

This is an important case that has come to a premature conclusion. State colleges and universities are places in which the infinite diversity of human thought should be celebrated. Such institutions ought not be in the business of suppressing divergent viewpoints, a concept antithetical to the Constitution and to the cherished values upon which this nation was founded. We can only hope that, in this case, Sue Harris DeBauche was not silenced on account of her views as to how the Commonwealth of Virginia could best be governed. Unfortunately, as the result of the majority's decision today, we may never know.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SUE HARRIS DEBAUCHE

Plaintiff,

v. Civil Action
Number 3:97CV770

VIRGINIA COMMONWEALTH
UNIVERSITY, et. al.

Defendants.

MEMORANDUM OPINION

THIS MATTER is before the Court on four motions by the defendants. The first is a motion to dismiss the Amended Complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure by the defendants Virginia Commonwealth University ("VCU") and VCU President Eugene Trani, in both his individual and official capacities (collectively, "University Defendants"). The second is a motion to dismiss the Amended Complaint under Rule 12(b)(6) by the owner of television station WNVT, Central Virginia Educational Telecommunications. Inc. ("CVETC"). The third is a motion to dismiss, or in the alternative motion for summary judgment, by Clear Channel Radio, Inc. ("Clear Channel Radio"), the owner of radio station WRVA. Finally, the fourth is a motion by Lawrence Douglas Wilder ("Wilder") to dismiss under Rule 12(b)(6) or for summary judgment under Rule 56. For the

reasons expressed below, the Court GRANTS the University Defendants' motion to dismiss under Rules 12(b)(1) and 12(b)(6) as well as CVETC, Clear Channel Radio and Wilder's motions to dismiss under Rule 12(b)(6).

I. Background

The plaintiff Sue Harris DeBauche ("DeBauche") is the State Chairman of the Virginia Reform Party. She was a state-qualified and balloted Virginia Reform Party candidate for Governor of Virginia in the 1997 election. This case concerns DeBauche's exclusion from a gubernatorial debate entitled "Debate Virginia."

In April 1997, former Governor Wilder, who was a radio personality at WRVA, proposed and planned a debate between James S. Gilmore III ("Gilmore") and Donald S. Beyer ("Beyer"), who at the time were the only duly-qualified candidates for Governor. Some time after, VCU and President Trani offered the premises of VCU as a forum in which to hold the debate and offered to contribute VCU personnel, staff and other resources to promote, manage and execute the debate. On or about September 10, 1997, Wilder accepted VCU's offer to hold Debate Virginia. This debate was then promoted to the public by VCU and radio station WRVA. Between September 15, 1997[6] and October 1, 1997, DeBauche made requests to participate in Debate Virginia but she never received a response from Wilder or VCU.

Nonetheless, Debate Virginia was held on October 6, 1997 with only Gilmore and Beyer as participants. It was held

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1. September 15 is the date on which DeBauche became duly-qualified as a candidate for Governor.

before an audience of hundreds of invited guests and was broadcast to most areas of Virginia, including live broadcasts by the defendants WRVA and WNVT, among others. Soon after, on or about October 21, 1997, DeBauche made a written demand to VCU and Trani that they schedule a gubernatorial debate including Gilmore, Beyer and herself prior to the November 4, 1997 election to remedy the supposed damage done to DeBauche and her Party. VCU and Trani rejected this demand three days later.

In the November 4 election, Gilmore won. DeBauche failed to garner ten percent of the vote, the amount needed for the Reform Party to have automatic ballot access in the next race. As a result, she has brought this suit against the University Defendants, Wilder, CVETC and Clear Channel Radio.

The Amended Complaint has four counts.[7] Count one alleges that the defendants violated DeBauche, the Reform Party and its members' constitutional rights to free speech and freedom of association as guaranteed by the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Count two claims that the defendants' actions violated their rights to equal protection under the Fourteenth Amendment and 42 U.S.C. § 198 3 "by unlawfully discriminating on the basis of the content or viewpoint of her speech." Count three alleges that the defendant violated their rights to equal protection under the Fourteenth Amendment and 42 U.S.C. § 1983 by "unlawfully classifying the duly-qualified and -balloted candidates for Governor of Virginia without a

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2. The original complaint was filed on October 15, 1997. After reviewing documents from Beyer and Gilmore as well as VCU's web site, DeBauche amended the complaint to add WRVA and CVETC as defendants.

reasonable or compelling state interest and in a manner that failed to satisfy constitutional requirements." Finally, Count four claims their rights under the Ninth and Fourteenth Amendments and 42 U.S.C. § 1983 were violated by the defendants. The University Defendants, Clear Channel Radio, CVETC and Wilder have moved for dismissal of the Amended Complaint.

II. Discussion

A. Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a party to move for dismissal of a claim on the grounds of failure to state a claim upon which relief can be granted. When considering such a motion, the Court must presume that all factual allegations in the complaint are true. Martin Marietta v. International Telecommunications Satellite Org., 991 F.2d 94, 97 (4th Cir. 1992). All reasonable inferences must be construed in the light most favorable to the non-moving party. Id. The Court should not dismiss any claim unless it appears beyond a doubt that the plaintiff could not recover under any set of facts which could be proven. Conley v. Gibson, 355 U.S. 41,45-46 (1957); Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1995).

The standard of review for a 12(b)(1) motion in turn, is a function of the motion's purpose. Where the motion constitutes a facial attack upon the complaint's allegations of subject matter jurisdiction, the Court must presume that all factual allegations in the complaint are true, Puerto Rico ex. rel. Quiros v. Alfred L. Snapp & Sons, 632 F.2d 365 (4th Cir. 1980), aff'd, 458 U.S. 592 (1982), and make all reasonable inferences in the plaintiffs favor. Johnson v. Mueller, 415 F.2d

354 (4th Cir. 1969); MacKethan v. Peat, Marwick, Mitchell & Co., 439 F. Supp. 1090 (E.D. Va. 1977). In this case, however, the motion challenges the actual existence of the Court's subject matter jurisdiction. In such a situation, the Court may "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993) (citations omitted). See Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). It is the plaintiffs burden to prove that jurisdiction in this Court is proper. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Fleming v. Workers' Comp. Comm'n, 878 F. Supp. 852,857 (E.D. Va. 1995) aff'd, 78 F.3d 578 (4th Cir. 1996). While the Court will read the plaintiffs complaint as a whole and will construe it broadly and liberally, it is not bound to draw argumentative inferences in the plaintiffs favor. Flue-Cured Tobacco Coop. v. United States EPA, 857 F. Supp. 1137, 1140 (M.D.N.C. 1994).

B. Analysis

The Court must first note that, although the election has occurred, the claims in DeBauche's Amended Complaint are not moot. It is more than conceivable that DeBauche as a Reform Party candidate for a political office will be excluded from a debate including only Democratic and Republican candidates and involving a state university. Even though DeBauche may attempt a preliminary injunction to stop such a debate, a court's final resolution of the matter may not occur before the election. particularly if the debate were to occur in the few weeks before the election. The effects on minority-party candidates like DeBauche from the circumstances presented in this case will persist in future elections but "within a time frame too short to allow resolution through litigation."

See Johnson v. F.C.C., 829 F.2d 157, 159, n. 7 (D.C. Cir. 1987).

However, DeBauche lacks standing to assert claims on behalf of the Reform Party. The alleged harm committed by the defendants was to exclude DeBauche from Debate Virginia. DeBauche does not allege, and cannot seriously allege, that the defendants have control over the gubernatorial election, its results, or automatic ballot access so that the Reform Party's loss of automatic ballot access can be attributed to the defendants. Therefore, the alleged injury to the Reform Party is tenuously related to the alleged harm to DeBauche. Moreover, there is no indication that the Reform Party has designated DeBauche to bring this suit on its behalf for any injury. See Marshall v. Meadows, 921 F. Supp. 1490,1493 (E.D. Va. 1996) (explaining party member cannot have standing when representing the party's interests if the party itself has not sought suit).

With that said, the Court will address the parties' arguments in two groups: the University Defendants and then the remaining defendants, who are all private parties.

1. The University Defendants

i. Eleventh Amendment

The Eleventh Amendment generally precludes lawsuits against the states, state agencies, or individual state officers in their official capacity. Seminole Tribe v. Florida, 517 U.S. 44 (1996). According to the University Defendants, because VCU is a state-supported institution, it is considered the Commonwealth of Virginia for purposes of the Eleventh Amendment and cannot be sued. In Harter v. Vernon, 101 F.3d

334,341 (4th Cir. 1996), cert. denied, 117 S.Ct. 2511 (1997), the Fourth Circuit stated its four-pronged test for determining whether an entity is an "arm of the state" and, thus, enjoys Eleventh Amendment immunity. The four factors are: (1) whether the state treasury will be responsible for paying any judgment that might be awarded; (2) whether the entity exercises a significant degree of autonomy from the state; (3) whether it is involved with local versus statewide concerns; and (4) how it is treated as a matter of State law. Id. at 340 (quotations and citation omitted). A court's inquiry should begin with the most important factor, which concerns the state treasury, and "if the State Treasury will pay the judgment, then the entity is immune and the other . . . factors need not be considered." Id.

In the case at bar, any judgment paid by VCU will be paid from the Virginia state treasury, as the state treasury is a major source of funds for the university.[8] This circumstance alone satisfies the Harter test.[9] VCU is an "arm of the state,"

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3. Even when VCU receives funds from sources outside of the state treasury, such as student fees, Virginia law requires that these funds from private sources be deposited into the Commonwealth's treasury and be appropriated by the Virginia General Assembly. See Va. Code § 2.1-180 (state agencies required to deposit funds "from any source" in state treasury, except for "endowment" funds).

4. 'The other factors under the Harter test fall in VCU's favor as well. VCU is controlled by a Board of Visitors. whose members are appointed by the Governor and approved by Virginia's General Assembly. See Va. Code § 23-50.6. VCU is under the control of the General Assembly. See Va. Const. art. VIII, § 9. Additionally, VCU's purpose of higher education is

and, consequently, the Eleventh Amendment applies here. A complaint alleging a claim under section 1983 does not constitute a waiver of a state's Eleventh Amendment immunity. Will v. Michigan Dep't State Police, 491 U.S. 58, 66 (1989). Therefore, the Court grants VCU's motion under Rule 12(b)(1) to dismiss all claims against it on the ground that VCU has not waived its immunity under the Eleventh Amendment. This leads to the question: do the claims against President Trani still stand?

With respect to the damages claims against President Trani in his official capacity, he is also considered an "arm of the state" for purposes of the Eleventh Amendment. See Will, 491 U.S. at 70-71 ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.").[10] Yet state officials are not

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a statewide, rather than a local, concern. Finally, See Va. Code § 23-50.4 (establishing VCU as a state entity). Its operating funds are substantially derived from Virginia's state tax revenues, and, like other state agencies and institutions, the Attorney General is the legal counsel and advisor for VCU.

5. In any event, the claim against President Trani is barred by the doctrine of qualified immunity. The doctrine of qualified immunity provides that government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). DeBauche has not alleged that President Trani played any role in the decision to invite only Gilmore and Beyer for Debate Virginia; therefore, she has not sufficiently alleged that he discriminated against her. No "clearly established statutory or constitutional right" was

necessarily immune from suits to enjoin alleged continuing violations of federal law, Ex Parte Young, 209 U.S. 123, 159-60 (1908), nor are they immune under the Eleventh Amendment from suits for declaratory relief and damages in their individual capacity, Hafer v. Melo, 502 U.S. 21 (1991). In the case at bar, DeBauche has not alleged that President Trani has been engaged in a continuing violation of her constitutional rights. Rather, the Amended Complaint asks for "a mandatory injunction commanding the defendants, their officers, employees, agents, successors or assigns, etc., to enjoin the defendants' interference with her exercise of her constitutional rights in the future." Amended Compl. at para. 102. In other words, DeBauche would like an injunction that would prohibit President Trani from violating a right that he is not currently violating. Unlike the situation in Young, DeBauche does not allege that President Trani is now engaged in an action that requires any federal intervention. As there is no allegation of a continuing violation, the Young exception does not apply. See Green v. Mansour, 474 U.S. 64 (1985) (affirming that Young exception limited to situations involving continuing violations of federal law). Consequently, Trani has complete Eleventh Amendment immunity in his official capacity.

ii. State Action by President Trani in His Individual Capacity

In order to allege a claim under section 1983,[11] a

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alleged to have been violated.

6. Section 1983 provides that [e]very person, who under color of any statute, ordinance, regulation, custom, or usage, of any State . . subjects any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by

complaint must allege that the defendant's actions denied a federal right and occurred under color of law. This "under color of law" requirement is the same as the state action requirement for a claim under the Fourteenth Amendment. Lugar v. Edmondson Oil. Co.. Inc., 457 U.S. 922,928 (1982). DeBauche essentially argues that, because VCU jointly sponsored the debate, all of the individual organizers were state actors, and they should be accountable for her exclusion. VCU, on the other hand, convincingly argues that DeBauche's brand of "sponsorship" is an insufficient theory of state action. Here, VCU's "sponsorship" occurred after Wilder's decision to invite only Beyer and Gilmore, and this "sponsorship"included only VCU's providing access to its facilities, use of certain managers and publicity. Even in a situation where the government or a state entity had a significant role in organizing a speaking event, the Fourth Circuit has held that the government's involvement did not necessarily make the private organizers state actors. In United Auto Workers v. Gaston Festivals, 43 F.3d 902 (4th Cir. 1995), a city and a nonprofit corporation co-sponsored an annual festival to be held on public streets and private property. The private organizers barred the distribution of any controversial material at the festival. The United Auto Workers wanted to distribute controversial materials and was denied access; it sued. The Fourth Circuit held that, despite the city's $10,000 donation, its authority to permit the event and its commitment to provide municipal services, the private organizers were not state actors. Id. at 914.

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the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

In fact, an attempt by VCU in the instant case to dictate whom any private organizer could invite would threaten that individual's First Amendment rights. In Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996), cert. denied, 117 S.Ct. 2409 (1997), a city leased its commons to the Bush Re-Election Campaign for a political rally and provided substantial promotional support as well as organizational assistance. The Campaign prohibited any critical expression of Bush at the rally. Still, the Sixth Circuit found that the rally did not violate First Amendment rights of those who wished to attend the rally in order to oppose the Bush message. According to the Court, "the present case strongly suggests that the city could not have required the committee to include in the rally persons imparting a message that the committee did not wish to convey." Id. at 198.

The government's role in Sistrunk and Gaston Festivals was as extensive as it was through VCU in the case at bar. VCU's level of sponsorship is not enough to make President Trani in his individual capacity a state actor. Thus, the Court grants the University Defendants' motion to dismiss the Amended Complaint as to Trani in his individual capacity for failure to sufficiently allege state action.

2. CVETC, Clear Channel Radio and Wilder

i. State Action

Again, in order to allege a claim under section 1983, a complaint must allege that the defendant's actions denied a federal right and occurred under color of law. The conduct that allegedly caused denial of a federal right must be "fairly attributable to the State." Lugar, 457 U.S. at 937. There are

two prongs to the fair attribution test. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." Id. Then, "the party charged with the deprivation must be a person who may fairly be said to be a state actor," and this last prong may be satisfied if the defendant "acted together with or has obtained significant aid from state officials." Id.

DeBauche does not come close to satisfying this second prong. In the Amended Complaint, DeBauche claims that CVETC and Clear Channel Radio denied her rights under the First Amendment and the Equal Protection Clause by excluding her from Debate Virginia. Her claim hinges on the allegation that CVETC and Clear Channel Radio, both private corporations, "jointly sponsored" Debate Virginia with state entity VCU. Yet the Amended Complaint does not sufficiently allege that Clear Channel Radio and CVETC acted under color of law; it fails to allege facts that show Clear Channel Radio and CVETC were "intertwined in a 'symbiotic relationship'" with VCU involving DeBauche's exclusion from Debate Virginia. See Haavistola v. Community Fire Co. of Rising Sun, Inc., 6 F.3d 2 11. 2 15 (4th Cir. 1993). Joint "sponsorship" of the debate, here, publicizing and airing it, is not equivalent to joint involvement in the decision to exclude certain individuals from the debate. There are simply insufficient allegations of fact to permit the Court to reach the conclusion that CVETC and Clear Channel Radio have acted under color of law in the decision to exclude the debate. Consequently, the Amended Complaint against CVETC and Clear Channel Radio must be dismissed for failure to state a claim upon which relief can be granted.

Moreover, there is insufficient joint involvement between VCU and Wilder in the decision to exclude certain

individuals from the debate. As expressed earlier concerning President Trani in his individual capacity, the level of VCU's involvement was not enough to attribute state action to any of the defendants here.[12] Wilder alone decided to invite only Gilmore and Beyer, and he has a First Amendment right to do so even if the debate occurred on the grounds of a state university. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995) (holding state courts' application of public accommodations law to essentially require defendants to alter expressive content of parade by including homosexual, lesbian and bisexual group violated parade organizers' First Amendment rights); Sistrunk, 99 F.3d 194 (holding no First Amendment violation where city leased town commons to private political organization for holding a rally and that organization in turn prohibited plaintiff due to her political speech). Since Wilder was also not acting under color of law, the Amended Complaint must be dismissed to him, as well, for

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7. With no legitimate claim of joint action, as the Fourth Circuit stated in Andrews v. Federal Home Loan Bank of America, 998 F.2d 214 (4th Cir. 1993), a private party can be deemed a state actor in only four contexts: (1) when the state coerced the private actor to commit an act that would be unconstitutional if done by the state: (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; and (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen. Id. at 2 17. DeBauche does not allege that any of those contexts exist here for any of the private parties.

failure to state a claim upon which relief can be granted.[13]

ii. Attorney's Fees and Costs

CVETC, Clear Channel Radio and Wilder also request attorney's fees and costs. Title 42, section 1988 of the United States Code states that in a section 1983 action, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Courts have construed section 1988 to mean that the defendant is entitled to a fee award where the action is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 421 (1978). The Court has determined that DeBauche's claims against CVETC and Clear Channel Radio were without foundation, as the two were not even alleged to have played a role in the decision to exclude her from the debate. As for Wilder, he had a First Amendment right to not include DeBauche, and her attempt to make him a state actor because VCU only helped execute the debate was baseless and unreasonable. Therefore, CVETC, Clear Channel Radio and Wilder may pursue their requests for attorney's fees.

III. Conclusion

In short. the Court GRANTS the University Defendants' motion to dismiss the Amended Complaint as to VCU and

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8. CVETC, Clear Channel Radio and Wilder also claim that they have qualified immunity to this suit. However, qualified immunity is only available to government officials, not private individuals and corporations. See Wyatt v. Cole, 504 U.S. 158 (1992).

President Trani in his official capacity under Rule 12(b)(1) due to Eleventh Amendment immunity. The Court GRANTS the motion to dismiss the Amended Complaint as to
President Trani in his individual capacity under Rule 12(b)(6) for failure to sufficiently allege state action. The Court GRANTS CVETC, Clear Channel Radio and Wilder's motions to dismiss the Amended Complaint under Rule 12(b)(6) for failure to sufficiently allege state action as well as CVETC, Clear Channel Radio and Wilder's requests for attorney's fees and costs. CVETC, Clear Channel Radio and Wilder may pursue their requests for costs by submitting a bill of costs as outlined by the Local Rules. and they may pursue their requests for attorney's fees by submitting further supporting documentation to the Court. They must file the requests for costs and documentation for attorney's fees within fourteen (14) days from the date of entry of the Order concerning the motions to dismiss. After the issue of costs and attorney's fees is resolved, the case will be dismissed.

An appropriate Order shall issue.

JAMES R. SPENCER
UNITED STATES DISTRICT JUDGE

APR 13 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SUE HARRIS DEBAUCHE

Plaintiff,

v. Civil Action
Number 3:97CV770

VIRGINIA COMMONWEALTH
UNIVERSITY, et. al.

Defendants.

ORDER

THIS MATTER is before the Court on four motions by the defendants. The first is a motion to dismiss the Amended Complaint under Rules 12(b)(l) and 12(b)(6) of the Federal Rules of Civil Procedure by the defendants Virginia Commonwealth University ("VCU") and VCU President Eugene Trani, in both his individual and official capacities (collectively, "University Defendants"). The second is a motion to dismiss the Amended Complaint under Rule 12(b)(6) by Central Virginia Educational Telecommunications, Inc. ("CVETC"), the owner of public television station WNVT. The third is a motion to dismiss, or in the alternative motion for summary judgment, by Clear Channel Radio, Inc., the owner of radio station WRVA. Finally, Lawrence Douglas Wilder ("Wilder") brings a motion to dismiss and a motion for summary judgment on the same grounds.

For the reasons expressed in the accompanying Memorandum Opinion, the Court hereby GRANTS the University Defendants' motion to dismiss the Amended Complaint: (1) under Rule 12(b)(1) as to VCU and President Trani in his official capacity for damages and (2) under Rule 12(b)(6) as to President Trani for all other forms of relief and in his individual capacity. The Court GRANTS CVETC, Clear Channel Radio and Wilder's motions to dismiss under Rule 12(b)(6); thus, Wilder's motion for summary judgment is moot.

Let the Clerk send a copy of this Order to all parties of record.

It is SO ORDERED.

JAMES R. SPENCER
UNITED STATES DISTRICT JUDGE

APR 13 1998
DATE

IN THE UNITED STATES DISTRICT COURT
VIRGINIA FOR THE EASTERN DISTRICT OF
RICHMOND DIVISION

SUE HARRIS DEBAUCHE

Plaintiff,

v. Civil Action
Number 3:97CV770

VIRGINIA COMMONWEALTH
UNIVERSITY, et. al.

Defendants.

MEMORANDUM OPINION

THIS MATTER is before the Court on a motion to determine the reasonableness of attorney's fees requested under 42 U.S.C. § 1988 by defendants Clear Channel Radio t/a WRVA, Central Virginia Educational Telecommunications, Inc. ("CVETC") t/a WNVT, and L. Douglas Wilder ("Wilder"). Also before the Court are motions by Clear Channel Radio and CVETC for attorney's fees and costs pursuant to 28 U.S.C. § 1927.

For the reasons stated below, the Court hereby GRANTS the defendants' requests, but alters the amount of fees. The Court also GRANTS Clear Channel Radio and CVETC's motions for attorney's fees and costs pursuant to 28 U.S.C. § 1927. Therefore, DeBauche and her counsel are jointly and severally liable for attorney's fees and costs incurred by Clear Channel Radio and CVETC.

I. Discussion

A. Standard of Law

In an April 13,1998 Memorandum Opinion and Order, the Court awarded Clear Channel Radio, CVETC and Wilder reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988. However, the Court's ruling that the defendants were entitled to a grant of attorney's fees brings the defendants "only across the statutory threshold." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Attorneys seeking an award of fees must submit an affidavit providing requisite evidentiary support for the party's entitlement to fees, as well as "satisfactory specific evidence of the prevailing market rates in the relevant community" for the type of work for which he seeks an award." Plyler v. Evatt, 902 F.2d 273, 277 (4th Cir. 1990) (quotations and citations omitted).

To grant a fee application, the Court must make a further determination from the fee applications whether the fee that is sought is 'reasonable.' Hensley, 461 U.S. at 433. For instance, some cases may be overstaffed, and the skill and experience of the lawyers may vary widely. Id. at 434. Additionally, any hours which are excessive, redundant, or otherwise unnecessary must be excluded from the fee award. Id. Further, "where the documentation of hours is inadequate, the district court may reduce the award accordingly." Id. at 433.

The crux of calculating a reasonable attorneys' fee award is in determining the lodestar figure. Daly v. Hill, 790 F.2d 1071, 1078 (4th Cir. 1986). The lodestar figure is calculated by multiplying the number of reasonable hours expended by a reasonable rate. Id. at 1077. In determining the

reasonable rate and reasonable hours, the Fourth Circuit has announced that the Court must use what are called the Johnson factors. Id. at 1078. Thus the Court must consider the following:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to properly perform the legal service;
(4) the preclusion of other employment by the attorney due to acceptance of case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Johnson v. Georgia Highway Express. Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). If the lodestar figure is properly calculated, adjustment will most likely be unnecessary. Daly, 790 F.2d at 1078. A proper lodestar calculation will accomplish fair and reasonable compensation and will constitute a reasonable fee contemplated by § 1988. Id.

B. Analysis

Now, the Court will address each defendant separately, for the defendants have supported their requests with varying degrees of documentation and legal argument.

1. Clear Channel Radio

Again, the starting point for determining an attorney's fee award is to multiply the number of hours reasonably expended by a reasonable hourly rate. In order to make this determination, the Court must turn to the Johnson factors and the record presented to it. Clear Channel Radio employed the law firm of Mays & Valentine, LLP, which has submitted its billing records totaling $13,321.50 plus 3,049.08 for working on this attorney's fees issue. In Mays & Valentine's Verified Bill of Costs and Documentation of Attorney's Fees, it appears the number of hours expended by partner Robert Brooke were 29.8 at $185-190 an hour; associate Andrew Mauck were 50.6 at $135-150 an hour; and by attorney P.C. Baxa were 2.0. In addition, Mauck spent 19.7 and Brooke spent 1.5 on the instant dispute over attorney's fees for a grand total of approximately 103.6 hours.

i. Time and Labor Required

In sum, the billing records reflect work in (1) analyzing the Amended Complaint, (2) legal research, (3) factual discovery that included reviewing documents in the record and interviewing witnesses, (4) filing a motion to dismiss and supporting memorandum, including an alternative motion for summary judgment, (5) filing a motion to stay discovery, and (6) preparing for and attending oral argument. Mays & Valentine adds that they used sound billing judgment. They had associate Mauck perform most of the work to save costs. They filed motions and memoranda only on issues relevant to Clear Channel. They incorporated by reference CVETC's memoranda in its motion to dismiss, and they decided not to pursue oral argument on Clear Channel's motion to dismiss after listening to the other defendants' motions at the January 26, 1998 hearing. To further save money, they moved to stay discovery pending the Court's decision on the motion to dismiss and then decided not to present oral argument on the motion.

The Court has carefully reviewed both the April 27, 1998 Verified Bill of Costs and Documentation of Attorney's Fees as well as the May 21, 1998 Supplementation, and the Court has determined some of the hours listed were either not required labor or inappropriate time. In certain instances, there was duplicative billing by the law firm. For example, on January 19, 1998, both Brooke and Mauck bill for the same strategy and scheduling conference with each other. This is also duplicative, and the Court will consider only Brooke's time. Next, on January 26, 1998, both Brooke and Mauck bill for a conference with each other and their attending the motion to dismiss hearing, among other things. As for the conference, the Court will allow only 2.4 hours at Brooke's billing rate of $190 an hour. However, neither lawyer argued on behalf of Clear Channel at the January 26, 1998 hearing. The Court cannot conclude that Clear Channel's lawyers merely attending the hearing was required time.

On January 30, 1998, Brooke and Mauck had a conference with each other concerning brief editing. Finding this also duplicative, the Court will consider only Brooke's billing. There was also duplicative billing concerning things other than conferences. On January 12, 1998, both Brooke and Mauck bill for e-mails that they share regarding the scheduling of the January motion to dismiss hearing. This is duplicative and the Court will consider only Mauck's billing because it includes a conference with Attorney Knicely. Finally, on April 14, 1998, both Brooke and Mauck bill for reviewing this Court's opinion on the motion to dismiss. This is duplicative and the Court reduces Mauck's 2.4 hours time entry by the amount claimed by Brooke, which is 1.2 hours. Further, the Court believes that the numerous conferences within the firm on the day of January 5, 1998, were excessive and that only half of the time was required.

There was more than just duplicative billing. The Court also believes that the time and labor of Philip Baxa, who was not even counsel of record, is not required in light of Brooke and Mauck's work. Therefore, the Court has not considered the 2.0 hours claimed by Baxa on Mays' records.

ii. Novelty and Difficulty of the Questions

Clear Channel argues that DeBauche has herself to blame for making the case overly complicated and expensive, as she was the one who tiled an Amended Complaint 30 pages long with over 100 paragraphs and multiple counts under the First, Ninth, and Fourteenth Amendments of the U.S. Constitution, 42 U.S.C. § 1983, and 28 U.S.C. § 2201-2202. She even sought nominal, compensatory and punitive damages, costs and attorney's fees against Clear Channel. Clear Channel adds that she had a "high-powered and high-profile legal team" including the law firm of Knicely and Cotorceanu, P.C.; attorney Thomas S. Neuburger, P.A. who is a legal specialist from Delaware; Professor James Raskin of American University; and John Whitehead of the Rutherford Institute. Further, DeBauche filed briefs in excess of 190 pages that cited dozens of cases implicating free speech law in the area of political debates, voting and rights of association.

Yet the Court would characterize the case as somewhat difficult. There were novel First Amendment arguments raised, but the pivotal issue for Clear Channel was whether it could be characterized as a state actor, which is a commonly litigated issue in Section 1983 cases.

iii. Skill Requisite to Perform the Legal Service Properly

Clear Channel argues that the case required lawyers skilled in constitutional law and complex litigation, such as

Brooke and Mauck from Mays & Valentine. While the Court would agree that the Complaint presented constitutional questions, the Court believes that the most desirable attribute for proper legal service in this matter was Section 1983 experience, which both Brooke and Mauck attest to having.[1]

iv. Customary Fee

In considering this factor, the Court is reminded that "the proper measure of fees is the prevailing market rate in the relevant market, and not the rate charged by the actual attorney in question." See Trimper v. City of Norfolk, 58 F.3d 68,76 (4th Cir. 1995). The determination is fact-intensive and best guided by what attorneys earn from paying clients for similar service in similar circumstances. Blum v. Stenson, 465 U.S. 886, 895 (1984). Evidence of fees paid to attorneys of comparable skill in similar circumstances is relevant, as well as the rate actually charged by the petitioning attorneys when it is shown-that they have collected those rates in the past from the client. See Rum Creek Coal Sales. Inc. v. Caperton, 31 F.3d 169, 175 (4th Cir. 1994).

Affidavits by attorneys Yvonne Wellford and Michael

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1. Brooke, a partner in the firm's business and commercial litigation section, has previously represented clients involved in Section 1983 litigation, including the appeal of a favorable ruling in a Section 1983 case to the United States Court of Appeals for the Fourth Circuit.

Mauck, an associate in the same firm section, has previously been involved in cases representing plaintiffs in Section 1983 and those involving constitutional issues of free speech and the right to associate.

Condyles of the law firm Maloney, Huennekens, Parks, Gecker & Parsons as well as the 1996 Law Firm Statistical Survey tendered by Clear Channel support that the hourly rates for Brooke and Mauck are reasonable and fall within the range for partners and associates, respectively, in the Eastern District of Virginia.[2] Further, this Court is aware of the prevailing rates in Richmond, having presided over many cases of this type, and concludes that the rates at issue here fall within the norm. See Hardman v. Bd. of Education, 714 F.3d 823 (8th Cir. 1983) (district court did not err in failing to hold evidentiary hearing on issue of attorney's fees under Section 1988 since district judge must be deemed well aware of attorney fees currently charged by attorneys performing similar work in the community).

v. Amount Involved and Results Obtained

Based on its motion to dismiss, the Court dismissed the entire case and determined that there was no basis for DeBauche's claims against Clear Channel. Thus, Clear Channel obtained successful results and avoided compensatory and punitive damages claims even though it did not prevail on the qualified immunity and mootness issues. The attorneys point out, though, that they spent little time on those issues.

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2. Wellford states that Brooke and Mauck's rates fall within the range for experienced lawyers and associates in civil rights litigation in the Eastern District of Virginia. Condoyles adds that regular rates for experienced lawyers in business and commercial litigation cases generally range from $150 to $250 per hour and for senior associates from $145 to $195 per hour. The Survey, in turn, compared ten comparable Virginia and North Carolina firms and illustrates that Brooke and Mauck's fees are within the median range.

vi. Experience, Reputation and Ability of the Attorneys

As earlier discussed, both Brooke and Mauck have Section 1983 experience. Brooke has been practicing since 1984, and Mauck has been practicing since 1991.

vii-Nature and Length of the Professional Relationship, with Client

Mays & Valentine has represented Clear Channel for many years and has always charged Clear Channel the firm's standard billing rates.

viii. Awards in Similar Cases

Clear Channel claims that it cannot find similar cases but that the cases law demonstrates that it is seeking "a very low amount in this type of litigation." See Superior Form Builders v. Dan Chase Taxidermy Supply Co.. Inc., 881 F.Supp. 1021 (E.D. Va. 1994) (awarding $74,104.50 in attorney's fees but after jury verdict); Morse v. Republican Party, 972 F.Supp. 355 (E.D. Va. 1997) (awarding $85,882.50 in attorney's fees). DeBauche has not tendered to the Court any examples of awards.

ix. The Remaining Johnson Factors

As for the other factors, such as whether the attorneys were precluded of other employment due to their acceptance of this case, the attorneys have not offered argument. However, the Court does not believe that this case, which did not progress beyond a motion to dismiss and involved Clear Channel for about five months, prevented Brooke and Mauck from taking on other cases. Also, Clear Channel offers no argument as .to

Johnson factors (6), (7) and (10). It appears, though, that the case was accepted on a fee basis, and the Court has no indication that any time limitations were imposed by Clear Channel on Mays & Valentine. There also appears no reason why the case would be considered "undesirable."

x. Determining the Lodestar

Upon consideration of the Johnson factors, above, the Court has concluded that the following are reasonable rates for each of the attorneys contributing to the work product of this case:

	Hours	Rate	Fee
Robert Brooke	0.5	$180.00	$90.00
	28.6	$190.00	$5,434.00

	Hours	Rate	Fee
Andrew Mauck	19.7	$135.00	$2,659.50
	37.0	$150.00	$5,550.00

TOTAL/Lodestar Figure: $13,733.50

xi. Expenses

"In determining an award of attorney's fees, litigation expenses, such as supplemental secretarial costs, copying, telephone costs, and necessary travel, are integrally related to the work of an attorney and, thus, are compensable." Superior Form Builders, 881 F.Supp. at 1029 (quotations and citation

omitted). Here, Clear Channel asks for $189.30 in copying and printing costs for its motion to dismiss and supporting memoranda. It also asks for an additional $64.08 in costs and expenses for work on the attorney's fees request. While the first request appears reasonable,[3] the latter is problematic. Clear Channel provides no account of how these costs and expenses were engendered. Therefore, the Court, unable to determine the appropriateness of the cost, will not add the $64.08 to the total award.

Thus, Clear Channel's total award, including attorney's fees and expenses is $13,922.80.

2. CVETC

CVETC employed Hunton & Williams which led to billed attorney's fees and expenses totaling $29,885.75. Nine people worked on this case on behalf of CVETC, which is far more than any of the other defendants. Partner Hewitt Pate billed at $235 an hour and expended 35.75 hours. Associate John Martin billed at $165 an hour and worked approximately 122.5 hours. Partner Guy Tripp III billed at $300 an hour and

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3. DeBauche disputes only the copying charge of $161.50 from the U.S. District Court Clerk on January 9, 1998. In defense of the copying, Clear Channel states that it needed a complete record of the case, from DeBauche's Complaint to other defendants' motions and memoranda. The Court finds Clear Channel's justification satisfactory because Clear Channel was added as a defendant after the case had somewhat progressed and, even after Clear Channel became a defendant in November 26, 1997, it was not served all of the pleadings in the case.

worked 5.5 hours.[4] There are also other personnel seeking fees. Stephen Demm billed at $195 an hour and worked .50 hours. Sydney Bear worked at $45 an hour and billed .50 hours. Cyndi Farkas and Christopher Higgins worked together 12.25 hours at $70.00 and $65.00 an hour, respectively. Librarian Ann Long worked .25 hours at $80 an hour, and finally librarian Robert Webster worked at $30 an hour for 1 hour. The grand total of hours equaled approximately 178.25 hours, which is over seventy hours more than the other defendants.

i. Time and Labor Required

The billing records reflect work in the following areas and amounts by the three primary attorneys, Pate, Tripp and Martin: (1) 52.25 hours on research and drafting the dismissal brief; (2) 32.50 hours on the reply brief on the motion to dismiss; (3) 8.75 hours in preparing for and attending oral argument; (4) 7.5 hours in coordinating with defense attorneys; (5) 9.75 hours in researching and drafting the motion for a stay of discovery; (6) 11.00 hours in initial pleading review; and (7) 10.25 hours in "miscellaneous" items, which must include reviewing pleadings and calling the Court about scheduling. In addition, Pate and Martin spent 25.75 hours working on the instant attorney's fees issue.

At the outset, the Court must state that Hunton & Williams overstaffed in this case, which is clearly evidenced by the fact that Clear Channel Radio, which was a private broadcaster in the same position as CVETC, has requested fees for primarily two individuals that did nearly all of its work. The Court notes, however, the fees of five of the individuals (an attorney, two paralegals and two library assistants) amounts to

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4. It appears the firm is not including a fee for Tripp's services.

only $205.00. Therefore, the Court reduces the request by $205.00 for overstaffing and will include in the award only the work performed by the primary attorneys, Pate and Martin, and paralegal, Higgins.

With that said, the Court finds some of the time entries to be unnecessary and duplicative. For example, on December 9, 1997, Pate had a conference with Martin, and they both billed for it.[5] Therefore, the Court subtracts 1 hour from Martin's time. Then, on January 22, 1998, both Pate and Martin met with the other defense counsel in this case at the Attorney's General's Office and both billed for that time. This time, which is inappropriately couched within a list of other items, is duplicative, and the Court will reduce Martin's time by 2.75 hours. Then, on April 14, 1998 Martin bills .25 hours for reviewing this Court's opinion on the motion to dismiss while Pate bills 1.0 hour for the same review. The Court finds this duplicative and reduces Martin's .25 hour time. There are other concerns with the amount of time and labor Hunton & Williams claims to have expended in the case. Martin's listing of .50 hour on December 30, 1998 for scheduling a hearing on the motion to dismiss is excessive. The Court did not hold a 30 minute conversation with Martin and, thus, reduces the time to .10 hour. Then, Martin bills a total of 5.25[6] for preparing for oral

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5. The time entries are also problematic because both Pate and Martin include other work that they did in the case within each entry so that the Court has no way of determining the actual time spent on the conference.

6. CVETC has submitted a Summary of Primary Attorney Time which states that Martin spent 5.25 hours preparing for and attending oral argument on January 26, 1998. In looking at the actual time sheet, the Court sees that only 4.75 hours were

argument on the motion to dismiss while Pate is the attorney that actually gave argument and even billed for his own preparation time. This is redundant. The Court strikes Martin's preparation on January 23 as well as his attendance at the hearing on January 26. Finally, on March 17, 1998, both Martin billed for .25 hour spent on reviewing Wilder's summary judgment brief while Pate billed .75 hours for the same task. This was unnecessary, as CVETC's own motion to dismiss had already been ripe for decision by the time Wilder filed a dispositive brief; it can hardly be said that either Pate or Martin's reading the brief was in necessary preparation for the case. Even after these reductions in time, the Court must still consider 151.35 hours as time billed by Pate and Martin in this case. The Court realizes that 151.35 hours appears excessively high for working on a motion to dismiss, a motion to stay discovery, and the related attorney's fees in this slightly difficult Section 1983 case, particularly in light of the fact that Clear Channel Radio expended nearly 80 billable hours on the case and Wilder expended close to 100 billable hours. However, CVETC filed its motion to dismiss first and its arguments in that motion to dismiss were substantially relied upon by both Clear Channel and Wilder. Therefore, the difference in total time spent on the case partially reflects the fact that CVETC pioneered the state action and First Amendment arguments made in the case as between Clear Channel and Wilder.

Still 151.35 hours amounts to nearly three work weeks of eight-hour days completely devoted to the DeBauche case. The Court determines that this is excessive and hereby reduces

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marked as either preparing for or attending oral argument. As Hunton & Williams knows best whether Martin spent a portion of some other time entry working en the January 26, 1998 hearing, the Court will accept this 5.25 figure as accurate.

the number of hours spent by Martin (which were the bulk of the total at 120.1 hours) by twenty percent, for a final total as between Martin and Pate of 127.33 hours.

ii. Novelty and Difficulty of the Question

CVETC and Clear Channel Radio were in the same position in defending against DeBauche's Complaint. Both merely broadcast the debate and did not participate in the decision to exclude DeBauche from the debate. Both faced First Amendment issues as well as the pivotal question of state action under Section 1983. Therefore, the Court's analysis of this factor for CVETC is the same as it was for Clear Channel.

iii. Skill Required to Perform the Legal Service Properly

Partner Hewitt Pate, a former law clerk on the United States Supreme Court and the Court of Appeals for the Fourth Circuit, has election law experience.[7] Associate John Martin, a former law clerk on the Court of Appeals for the First Circuit and a former attorney for the United States Department of Justice, has federal motions practice experience representing state actors in First Amendment and other constitutional challenges. The Court believes that attorneys Pate and Martin possess the requisite skill for the legal service in this case.

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7. He taught three semesters of election law at the University of Virginia Law School, represented Senator John Warner in a successful effort to enforce Virginia law regarding nomination procedures and successfully defended Manhattan's premiere business improvement district against a "one person, one vote" lawsuit. He has handled numerous other constitutional and civil rights matters.

iv. Customary Fee

In order to show that the requested fees are customary in this market and reasonable for representation of this type, CVETC provides a Declaration by Michael P. McDonald, who is the President of the Center for Individual Rights and typically engages outside counsel from major law firms to provide representation to clients in civil rights litigation. Not only does McDonald note that $235 an hour for Pate and $165 an hour for Martin is reasonable particularly given their level of expertise, he calls the Court's attention to the case Rosenberger v. The Rector and Visitors of the University of Virginia, 1996 WL 537859 (W.D. Va. 1996) (unpublished), where that Court considered one attorney's "distinguished career" as ground to allow an unusually high fee. Id. at *5. As already shown in the Court's analysis of the customary associate fee for Clear Channel Radio, Martin's hourly billing rate falls well within the median range for the Eastern District of Virginia. Pate's range, as well, falls within the median range for medium to high level equity partners.[8]

v. Experience. Reputation and Ability of the Attorneys

As earlier discussed, both Pate and Martin have election law experience and this Court believes that they were capable of handling a Section 1983 suit.

vi. Remaining Johnson Factors

The Court considers the factors as follows. Like Clear Channel, CVETC faced compensatory and punitive damages

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8. The Court assumes that Pate fits within this category of partners based on his background and election law work.

claims, which it was able to avoid by a successful motion to dismiss. The Court notes, however, that CVETC did not prevail on its qualified immunity and mootness arguments. In addition, CVETC has been a long time client of Hunton & Williams, particularly of partner Guy Tripp, and has been charged in a similar fashion to the fee petition presented to this Court. As for whether the attorneys in this case were precluded of other employment due to their acceptance of the case, the Court is of the opinion that the case did not progress far enough to prevent either Pate or Martin from taking on new cases. There is no indication that time constraints were placed on the attorneys by CVETC or that the case should be considered "undesirable" or that it was accepted on a contingent basis.

vii. Determining the Lodestar

Upon consideration of the Johnson factors, above, the Court has concluded that the following are reasonable rates for each of the attorneys contributing to the work product of this case:

	Hours	Rate	=	Fee
Hewitt Pate	31.25	$235.00		$7,343.75
John Martin	96.08	$165.00		$15.853.20
TOTAL/Lodestar Figure			(minus	$205.00)

viii. Expenses and Costs

CVETC asks for $90 in costs and $763.75 in fees for the services of paralegal Christopher Higgins, who expended 11.75 hours at a rate of $65 an hour working on the motion to dismiss. The Court concludes that the $90 in costs is reasonable,

as they represent fees for copying pleadings from the Clerk's Office and are lower than other requests before the Court for the same kind of copying. The 11.75 hours billed by Higgins cover cite-checking work and his organization of pleadings, correspondence and legal research for Martin. His hours seem reasonably expended and are specifically unchallenged. Therefore, the Court awards an additional $853.75.

3. Wilder

Wilder has not submitted an analysis under the Johnson factors; therefore, the Court's consideration of his fee application is somewhat constrained. He was represented by the law firm of Wilder & Gregory, which states that the costs incurred in defense of Wilder totaled $12,222.50. Four attorneys worked on Wilder's behalf. Roger Gregory expended 2.5 hours at $115 an hour; Kimberly Friend Smith 26.25 hours at $115 an hour and Lawrence Wilder, Jr. 42.50 hours at $115 an hour. Laura Hillenbrand spent 40.10 hours at $115 an hour and Celestine Woodson spent 10.05 hours at $45 an hour. The Court's analysis under the Johnson factors follows.

i. Time and Labor Rewired

The Court has reviewed defendant Wilder April 23, 1998 fee application and believes that certain items exhibit duplicative billing. On November 21, 1997, both Lawrence Wilder, Jr. and Roger Gregory billed for the time they spent in a strategy conference with each other. The Court finds this inappropriate and will consider only the time claimed by Wilder. Then, again, on November 25, 1997, Kimberly Smith and Lawrence Wilder, Jr. both billed for the same research conference that they had with each other. Therefore, the Court

reduces the request by the total 2.75 hours billed by Smith as she has not differentiated what portion of that amount includes the conference and what portion includes the Section 1983 research. On January 22, 1998, Lawrence Wilder, Jr. and Laura Hillenbrand both billed for meeting with each other and with other defense counsel; the Court will consider only half of their time charged.

Further, the Court believes that the time requested for covering both Lawrence Wilder, Jr. and Laura Hillenbrand's observation of the hearing before this Court on Virginia Commonwealth University and Eugene Trani's motions was unnecessary. Defendant Wilder's attorneys did not make any argument before the Court; therefore the Court strikes the 2.25 hours Laura Hillenbrand claims for preparing for and attending the hearing as well as the 1 hour claimed by Lawrence Wilder, Jr. In addition, the Court believes that the March 3,1998 charge as well as the March 10, 1998 charge concerning Chambers and administrative matters is unmerited; therefore, the Court reduces the billed entries by 10% each.

Finally, the Court is not unmindful of the fact that Wilder's motion to dismiss and motion for summary judgment are mirror images of each other in argument and are nearly verbatim. The Court finds it objectionable that the law firm make separate billings for work on the motions. Consequently, the Court believes the following hours are unnecessary time and labor: Hillenbrand's March 12, 1998 1.8 hours on the motion for summary judgment, March 13, 1998 .6 hours on the motion for summary judgment, March 13,1998 .2 hours on the motion for summary judgment.

ii. The Remaining Johnson Factors

The Court does not have affidavits describing the four attorneys' expertise in order to factor in a number of the Johnson factors, such as whether they possessed the skill requisite to perform the legal services properly, whether representing Wilder precluded any of the attorneys from other employment, and what the nature and length of the professional relationship with Wilder has been. The Court also cannot ascertain whether Wilder placed any time restraints on the firm. As a result, these factors cannot be interpreted in a light that would favor Wilder's fee application. From the other fee applications before the Court, however, the Court can ascertain the customary fee. All of Wilder's attorneys billed at $115 an hour, which is slightly lower than the median range presented to the Court for mid to high level associates and lower than the other associate fees in this case. Therefore, it is not unreasonable. The Court can also state that Wilder has obtained successful results in the same regard as Clear Channel and CVETC and that there is no indication that this kind of case would be considered undesirable.

However, there is one other consideration that the Court must address. DeBauche believes that Wilder's request should be denied in its entirety. She points out that the bill is not directed to Wilder, but to "Commonwealth of Virginia, Division of Risk Management. " Yet this Court believes that it is irrelevant that the "Division of Risk Management" has been billed for the firm's representation of Wilder. This Court has granted the attorney's fee to Wilder in payment to Wilder & Gregory. Wilder & Gregory, in turn, has the responsibility to reimburse Risk Management and the taxpayers for any payments made.

iii. Determining the Lodestar

Upon due consideration, the Court has concluded that the following are reasonable rates for each of the attorneys contributing to the work product of the case:

	Hours	Rate =	Fee
Roger Gregory, Jr.	1.5	$115.00	$172.50
Lawrence Wilder, Jr.	41.3	$115.00	$4,749.50
KimberlyFriendSmith	23.5	$115.00	$2,702.50
Laura Hillenbrand	21.85	$115.00	$2,512.75
TOTAL/Lodestar Figure:			$10,137.25

iv. Expenses and Costs

Wilder also asks for $28.70 in costs incurred in the printing and copying of his motion to dismiss as well as litigation expenses stemming from Celestine Woodson's filing, copying and secretarial work in assisting the attorneys listed above. Woodson billed at $45 an hour for 10.05 hours worked. Finding these costs and expenses to be reasonable, the Court adds $452.25 and $28.70 to the award.

4. Clear Channel and CVETC's Motions for Attorney's Fees and Costs under 28 U.S.C. 6 1927

Section 1927, Title 28 states that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." Section 1927 requires a finding that counsel acted in bad faith as a precondition to the imposition of fees. See Brubaker v. City of Richmond, 942 F.2d 1363, 1382-83, n. 25 (4th Cir. 1991). To this end, the "unreasonable and intentional pursuit of frivolous positions" by

an attorney is sufficient to support a finding of the bad faith necessary for the imposition of fees under 28 U.S.C. § 1927. See Mason v. Riddick, Criminal Case Number 3:97CV266 at p. 3 (E.D. Va. August 11, 1997).

In the Section 1927 motions, Clear Channel and CVETC claim that DeBauche's attorneys acted in bad faith by signing and filing the Amended Complaint with frivolous claims against private station defendant, which were not state actors as required for a Section 1983 suit, and by refusing to dismiss those private defendants after it became clear DeBauche had no case. In turn, DeBauche opposes this motion because she claims that her attorneys did not bring the suit in bad faith or vexatiously multiply or prolong the litigation, as the record suggested to the attorneys that the defendants jointly sponsored the Debate. They genuinely believed that Free Speech law supported the claims.

Yet, as described in the Court's April 13, 1998 Memorandum Opinion, from the very beginning it was evident that DeBauche was tying the private broadcasting defendants with a tenuous string to Virginia Commonwealth University in order to show they were exhibiting state action. It was clear from-the beginning that Wilder alone made the decision to exclude her from Debate Virginia and that the private defendants and the University were not in some collaboration about that Wilder decision. While the case may have made for an interesting analysis of timely First Amendment issues if it had survived the motions to dismiss, DeBauche's attorneys chose to overlook the one essential element of their multi-private defendant lawsuit, that is, that there must be state action in the first place. Theirs was an unreasonable and intentional pursuit of a frivolous position which warrants an award under Section 1927, particularly in light of DeBauche's financial situation and

the Court's question as to how her lawsuit has been funded. Consequently, the Court holds DeBauche's attorneys jointly and severally liable for the fee awards.

III. Conclusion

In short, the Court awards attorney's fees and costs in the following amounts: (1) to Clear Channel Radio, $13,922.80; (2) to CVETC, $23,935.70; and (3) to Wilder, $10,618.20.

An appropriate Order shall issue.

JAMES R. SPENCER
UNITED STATES DISTRICT JUDGE

SEP 4 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SUE HARRIS DEBAUCHE

Plaintiff,

v. Civil Action
Number 3:97CV770

VIRGINIA COMMONWEALTH
UNIVERSITY, et. al.

Defendants.

FINAL ORDER

THIS MATTER is before the Court to determine the reasonableness of attorney's fees requested under 42 U.S.C. § 1988 by defendants Clear Channel Radio t/a WRVA, Central Virginia Educational Telecommunications, Inc. ("CVETC") t/a WNVT, and L. Douglas Wilder ("Wilder"). Also before the Court are motions by Clear Channel Radio and CVETC for attorney's fees and costs pursuant to 28 U.S.C. § 1927.

For the reasons stated in the accompanying Memorandum Opinion, the Court hereby GRANTS defendants' requests, but alters the amount of fees. The Court also GRANTS Clear Channel Radio and CVETC's motions for attorney's fees and costs pursuant to 28 U.S.C. § 1927.

Therefore, Plaintiff Sue Harris DeBauche ("DeBauche") is DIRECTED to pay the following firms in these amounts:

(1) To Mays & Valentine, LLP (on behalf of Clear Channel Radio)

Fees:	$13,733.50
Costs:	$189.30
Total:	**$13,922.80**

DeBauche and her counsel of record are jointly and severally liable for the $13,922.80.

(2) To Hunton & Williams (on behalf of CVETC)

Fees:	$23,845.70
Costs:	$90.00
Total:	**$23,935.70**

DeBauche and her counsel of record are jointly and severally liable for the $23,935.70.

(3) To Wilder & Gregory (on behalf of defendant Wilder)

Fees:	$10,589.50
Costs:	$28.70
Total:	**$10,618.20**

DeBauche is solely liable for the $10,618.20.

The case is DISMISSED.

Let the Clerk send a copy of this Order to all parties of record.

It is SO ORDERED.

JAMES R. SPENCER
UNITE STATES DISTRICT JUDGE

SEP 4 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

SUE HARRIS DEBAUCHE 3809 Dillon's Fork Road Fieldale, Virginia 24089, **Plaintiff,**	)
v.	)**Civil action**)**No. 3:97CV770**
VIRGINIA COMMONWEALTH UNIVERSITY, a corporation established pursuant to Virginia Code §23-50.4 and an instrumentality of the Commonwealth of Virginia, c/o Jay M. Weinberg, Esquire Chairman, Board of Visitors 701 East Byrd Street Richmond, Virginia 23218, and **EUGENE P. TRANI**, individually and in his official capacity as President of Virginia Commonwealth University, 910 West Franklin Street Richmond, Virginia 23284, **L. DOUGLAS WILDER**, in his	)

individual capacity,)
)
c/o WRVA-AM Radio)
200 North 22nd Street)
Richmond, Virginia 23223,)
)
)
CLEAR CHANNEL RADIO, INC.,)
t/a WRVA, a Nevada corporation)
)
c/o Edward R. Parker, Reg. Agent)
5511 Staples Mill Road)
Richmond, Virginia 23228,)
)
and)
)
)
CENTRAL VIRGINIA EDU-)
CAIONAL)
TELECOMMUNICATIONS, INC.)
t/a WNVT, a Virginia corporation)
c/o Evans R. Brasfield, Reg. Agent)
951 E. Byrd Street)
Richmond, Virginia 23219)
)
Defendants.)

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES AND INJUNCTIVE RELIEF[9]

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[9] **This amended complaint is filed as of right under Rule 15(a), as set forth in the notice of filing. Amendments are highlighted by double underlining and/or stricken, as the case may be.**

STATEMENT OF THE CASE

1. This case raises critical issues under the Free Speech and Equal Protection Clauses presented in the case of Forbes v. Arkansas Educational Television Commission, 93 F.2d 497 (8th Cir. 1996), submitted after oral argument before the United States Supreme Court on October 8, 1997, in the case styled Arkansas Educational Television Commission v. Forbes, No. 96-779, concerning the dedication of state forums and resources for the benefit of some candidates for public office to the exclusion of others.

2. This case seeks a declaratory judgment, damages and injunctive relief for unlawful viewpoint discrimination and electoral gerrymandering in the 1997 Virginia Gubernatorial race**, and future statewide races,** through the commitment of substantial resources of the Commonwealth of Virginia for the benefit of the Republican and Democratic candidates for Governor, to the exclusion of the Gubernatorial candidate of the Virginia Reform Party **(the "Party")**, the Virginia affiliate of The Reform Party. The dispute is over the defendants' exclusion of Sue Harris DeBauche ("Ms. DeBauche"), the state-qualified and -balloted Virginia Reform Party candidate for Governor, from "Debate Virginia, the 1997 Virginia Gubernatorial Debate" ("Debate Virginia"), which was **co-sponsored,** planned, promoted, managed, executed and paid for by **WRVA, WNVT and affiliates and** Virginia Commonwealth University, an instrumentality of the Commonwealth of Virginia, on Monday, October 6, 1997, at the VCU Performing Arts Center in Richmond. **The defendants will not permit Ms. DeBauche or other statewide Party candidates to participate in any future Gubernatorial or statewide office**

debate sponsored, co-sponsored, planned, promoted, managed and/or executed by VCU, WRVA, and/or WNVT and affiliates, either now or in the future. All of the defendants will either individually or jointly sponsor, plan, promote manage or hold statewide debates in the future from which candidates of the Party will be excluded and to which only Democratic and Republican candidates will be invited.

3. Ms. DeBauche challenges the constitutional validity of the defendants' exclusion of Ms. DeBauche **or future Party candidates** from the public forum opened by VCU **or the other defendants** to the other two state-qualified and -balloted candidates for Governor **or other statewide positions**, the defendants' imposition of a prior restraint on speech at Debate Virginia, their exercise of unlawful content and viewpoint discrimination and, by their exclusion of Ms. DeBauche from Debate Virginia, their conferring state endorsement and special benefits upon the other two candidates, including public statements of preference and substantial financial assistance, thereby unlawfully and irreparably skewing and gerrymandering the outcome of the 1997 Virginia Gubernatorial Election**, and future elections**.

I.
JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331 and 1343, 28 U.S.C. § 2201 and 2202, the First, Ninth and Fourteenth Amendments to the Constitution of the United States and the doctrine of pendant jurisdiction. This action arises under the Constitution and laws of the United States, including the Civil Rights Act of 1871, 42 U.S.C. § 1983. Ms. DeBauche's claim arose in this judicial district and

venue lies in this district pursuant to 28 U.S.C. §1391(b)(1), (2) or (3).

II.

PARTIES

Plaintiff DeBauche

5. The plaintiff, Ms. DeBauche, is a citizen of the United States and a resident of the Commonwealth of Virginia. She is a taxpayer, a registered voter, a business consultant and owner and operator of several small businesses in Fieldale, Virginia, and a current candidate for Governor of Virginia.

6. Ms. DeBauche is the duly qualified and balloted Virginia Reform Party candidate for Governor of Virginia running in the 1997 Virginia Gubernatorial Election. She is also the State Chairman of the ~~[Virginia Reform]~~ Party. Ms. DeBauche intends to seek public office in the future and expects to run as a candidate for statewide office on the Virginia Reform Party ticket**, including the office of Governor,** in future primaries or general elections in the Commonwealth of Virginia and intends to participate in public forums where duly qualified candidates will contemporaneously and spontaneously debate and express their views on issues relating to the campaigns. **Other members of the Party will also do so in future elections.**

6a. Plaintiff brings this action on behalf of herself and the individual members of that political Party and on behalf of the Party, of which she is Chairman, a political organization.

6b. The candidate for the Presidency of the Party

in the 1992 election won approximately 13.6% of the statewide vote, and in 1996, approximately 6% of the statewide vote. The Party is an agent which is obligated to legally protect the rights of its constituent members.

6c. Plaintiff and the members of her Party have suffered injury in fact, both to her 1997 political campaign in that as a result of the defendants' actions, which affected the results of that election, the Party and its members who seek to run for statewide office will no longer automatically be entitled to a place on the ballot in Virginia elections, organizational activities are threatened and have been adversely affected by the defendants and the Party's ability to attract and to retain members has also been seriously compromised.

6d. Since plaintiff has herself suffered direct injury from the challenged actions, prudential considerations permit her to advance the interests of the Party and its members. Hereinafter, references to plaintiff include the named plaintiff and also by incorporation the Party and its individual members.

Defendant Board of Visitors of Virginia Commonwealth University

7. The defendant Virginia Commonwealth University is a corporation consisting of the Board of Visitors of Virginia Commonwealth University established pursuant to Section 23-50.4 of the Code of Virginia of 1950, as amended (the "Code"), and an instrumentality of the Commonwealth of Virginia. By statute, the corporation "shall be at all times under the control of the General Assembly of Virginia." Virginia Code §23-50.4. The Board of Visitors of Virginia Commonwealth University is responsible for the direction of the affairs and

business of the corporation, the promulgation of policies, rules and regulations pursuant to which VCU operates, and the appointment and direction of the defendant Eugene P. Trani as its President. The Board of Visitors is appointed by the Governor of Virginia, subject to confirmation by the General Assembly of Virginia. (The corporate defendant Virginia Commonwealth University is referred to in this Complaint as the "defendant VCU" and its Board of Visitors as the "Board of Visitors.")

Defendant Trani

8. The defendant, Eugene P. Trani ("Trani"), is a citizen of the Commonwealth of Virginia and the President of VCU. He is the chief executive officer of VCU and implements the policies and rules and regulations of the Board of Visitors of VCU. He is appointed by and subject to the direction and supervision of the Board of Visitors. He is sued in his individual capacity and in his official capacity as President of VCU.

Defendant Wilder

9. The defendant, L. Douglas Wilder ("Wilder"), is a citizen of the Commonwealth of Virginia and a former Democratic Governor of Virginia. He is now employed as a radio talk show host on WRVA-AM Radio. He served as convener and moderator of Debate Virginia and is sued in his individual capacity.

The Private Corporate Defendants

9a. Defendant Clear Channel Radio, Inc., a Nevada corporation, is the owner of WRVA Radio and is qualified to do business in Virginia. Its registered agent is Edward R. Parker. At all times relevant hereto it has either been a

state actor or a private person who is jointly engaged with state officials in the challenged actions, and with them or alone is acting under color of law.

9b. Defendant Central Virginia Educational Telecommunications Corporation, a Virginia corporation, is the owner of WNVT and is qualified to do business in Virginia. Its registered agent is Evans R. Brasfield. At all times relevant hereto it has either been a state actor or a private person who is jointly engaged with state officials in the challenged actions, and with them or alone is acting under color of law.

III.

THE CLAIM

The Statutory Scheme and Ms. DeBauche's Qualification as a Candidate for Governor

10. Chapter 5 of Title 24.2 of the Code sets out the requirements for candidates for public office in the Commonwealth of Virginia.

11. Section 24.2-500 of the Code requires that all persons who wish to qualify as candidates for public office in Virginia must be qualified to vote and hold that office. As a precondition for holding office, the person must be a resident of the Commonwealth for one year next preceding the election and be qualified to vote for the office in question.

12. Sections 24.2-501 and -502 of the Code set forth requirements for candidates for statewide office, including the office of Governor of Virginia, and require the filing by

candidates of a written statement of qualification and economic interests under oath attesting to certain facts related to candidacy.

13. Under Section 24.2-503 of the Code, the deadline for qualifying as a candidate in a general election is the second Tuesday in June.

14. Under Section 24.2-504 of the Code, only a person fulfilling all requirements of a candidate shall have his or her name printed on the election ballot.

15. Under Sections 24.2-509, -510 and -511 of the Code, procedures are established for the nomination of candidates by political parties and the certification of political party candidate nominees to the State Electoral Board.

16. Under Sections 24.2-539 and 541 of the Code, whenever a candidate withdraws as the party candidate, the political party may nominate a person to fill the vacancy in accordance with the party's rules and the name of the newly nominated candidate shall be printed on the ballot if it is known at least forty-five days before the general election.

17. On or about June 7, 1997, the Virginia Reform Party of Virginia selected Mamie Moore of Richmond as its Gubernatorial candidate at its State Convention, but in late June, 1997, Ms. Moore was forced to withdraw as a candidate due to family illness.

18. At an August 15, 1997, meeting of the Virginia Reform Party's State Central Committee held to select a candidate, the Committee voted to defer consideration of a substitute candidate until its September meeting because

Committee members had reason to believe that the defendant Wilder would consider running on the Virginia Reform Party ticket.

19. At a meeting of the Virginia Reform Party State Central Committee on September 14, 1997, the Vice-Chairman of the Party reported that he had personally spoken with the defendant Wilder about running as the Virginia Reform Party candidate and that Wilder indicated that he had no interest in the proposal. Thereafter, Ms. DeBauche was elected by the Central Committee to serve as its Gubernatorial standard bearer.

20. Ms. DeBauche duly qualified with the State Board of Elections as a candidate for the Office of Governor of Virginia on the Virginia Reform Party ticket on or about September 15, 1997, a few days after the defendant VCU accepted responsibility for promoting, managing and hosting Debate Virginia and three weeks before Debate Virginia was held.

The Rules and Regulations of VCU

21. VCU is a public university with two campuses, one situated in the Historic Fan District of the City of Richmond where Debate Virginia was held.

22. The Mission Statement of VCU states that VCU "provides a fertile and stimulating environment for learning, teaching, research, creative expression and public service." It also declares that VCU "serves the local, state, national and international communities through its scholarly activities, its diverse educational programs and its public services activities."

23. The Goals of VCU in carrying out its Mission

Statement include the following:

- Foster a scholarly climate that inspires creativity, a free and open exchange of ideas, critical thinking, intellectual curiosity, freedom of expression and intellectual integrity;

- Use the urban environment as a laboratory for studying and developing new approaches to problems pertaining to the public and private sectors;

- Develop innovative programs for continuing education that establish permanent intellectual connections between the university and its constituents, enhance professional competence, and promote dialogue on public issues;

- Mobilize its creative energies to meet the needs of society and individuals in its unique role as Virginia's major urban university.

24. The Rules and Procedures of VCU adopted by its Board of Visitors provides, in part that:
The University is committed to providing an environment conducive to academic freedom, free inquiry, and equal access to education and occupational opportunities. The principle of academic freedom requires all persons to respect another's dignity, to acknowledge another's right to express differing opinions, to cultivate and to cherish intellectual honesty, and to promote freedom of inquiry and expression. It is therefore the policy of the University that no act of any member of the University community shall serve to restrain or inhibit access to opportunities or the exercise of these freedoms.

Debate Virginia

24a. On July 7, 1997 defendant Wilder confirmed in

writing that negotiations were concluded relative to Debate Virginia and that it would be "jointly sponsored by WRVA, WNVT and affiliates and VCU."

25. **On or about April** ~~[25. On or about August]~~ 1997, Defendant Wilder, a radio talk show host on WRVA-AM radio, issued **formal** invitations to the Republican Gubernatorial nominee, James S. Gilmore, III, and the Democratic nominee, Donald S. Beyer, Jr., to join in a radio debate in which each could address the issues and their records.

26. In August 1997, defendant Wilder knew that the Virginia Reform Party had nominated a candidate, that the Virginia Reform Party candidate had withdrawn from the race and that the Party would be nominating a qualified substitute candidate for the office of Governor on or about mid-September.

27. At some time between the time that Wilder issued the call and invitation to debate, defendants VCU and/or Trani and/or their agents offered the premises of VCU as a forum to hold the debate and offered to contribute VCU personnel, staff and other resources to plan, promote, manage and execute the debate.

28. Wilder accepted the VCU offer on or about September 10, 1997, and from that date, **all** the defendants, **including but not limited to** VCU, and/or Trani and/or his agents, including without limitation staff members of VCU and its Center for Public Policy, ~~[and the defendant Wilder,]~~ took active steps to **sponsor,** plan, promote, manage, and execute "Debate Virginia," including without limitation, undertaking the following:

-- providing VCU personnel and all of the manpower necessary

to plan, promote, manage and execute Debate Virginia, including crews to assemble and disassemble facilities before and after the debate.

-- providing the forum for the debate at the VCU Performing Arts Center,

-- launching a 1-800 toll-free telephone number for debate questions manned and answered by VCU personnel and/or VCU's agents,

-- creating and maintaining a Worldwide Web page on the VCU world-wide web server which included pictures promoting the two candidates, a summary promoting the two candidates positions on the issues and links to Worldwide Wed pages promoting the candidates and their views,

-- creating and using the theme "Debate Virginia" for the event which was used with visual uniformly in everything from the Web Page to the stage backdrop to the Debate Virginia programs,

-- designing a distinctive logo for the debate which included the display of the two symbols for the Republican and Democratic Parties (an elephant and a donkey) and the words "The 1997 Virginia Gubernatorial Debate [star] DEBATE VIRGINIA [star] Virginia Commonwealth University",

-- coordinating press coverage and credentialing for the debate,

-- issuing press releases with information on the debate,

-- managing all of the logistical support to implement Debate Virginia, including arranging security, check-in, tickets, seating,

sound system, lighting, stage set-up and parking, and coordinating the event with the campaign staffs of Messrs. Gilmore and Beyer, and

-- providing all of the facilities and equipment necessary for the event, including space for a pre-debate reception at the University Student Commons, media rooms, candidate workrooms, television monitors, banks of telephones, facsimile machines, computer hookups, connection boxes for broadcast access to the pool feed, pool video and audio feeds of the debate to the media, tables, chairs, podiums, banners, an emergency generator, and tents.

29. As expressed in the words of the defendant Wilder, the forum constituting the debate was designed by the defendants for broadly inclusive purposes to reach all Virginia voters: This truly will be a debate where the residents of Virginia will get to ask the questions that they want these candidates to answer. . . . As we have planned for this debate, we have searched for ways for people from every corner of Virginia to easily put their questions on the table for these two candidates. . . .I encourage Virginians to take advantage of our Web Site and 1-800 number to get their voices heard.

. . . .

A democracy needs to engage everyone in the political process, and we have taken this responsibility to heart in developing a debate format that relies on citizen involvement for its success (emphasis supplied).

30. Upon information and belief, defendant Wilder promoted Debate Virginia on his weekly radio talk show on WRVA-AM, Richmond. **Both the private corporate**

defendants promoted the debate over the airways.

31. Prior to the debate, defendant Wilder stated his opinion that Messrs. Gilmore and Beyer "hadn't succeeded in getting their messages through to the voting public" and therefore announced his intention to inject Virginians into the campaign by soliciting direct questions for them from the people. Wilder declared that

> I'm issuing a true challenge for Virginians to take a greater role in selecting the right individual to lead this state for the next four years. **These questions will shape the debate**, and you'll get direct, unrehearsed answers that will help you decide for whom you will cast your vote (emphasis supplied).

To this end, the defendant VCU established the 1-800 toll-free telephone number and its Worldwide Web site, and took other actions, to solicit such input and to promote Debate Virginia.

32. Before the debate, Professor Robert D. Holsworth, director of the VCU Center for Public Policy, and a panelist for Debate Virginia, stated that the debate was important to both candidates because "it's the first galvanizing event of the campaign."

33. Before the debate, the defendant Wilder indicated that "I might tell people how I would vote" in the Gubernatorial race. The Richmond Times-Dispatch reported that political analysts considered such an endorsement by Wilder as "enough to influence a considerable number of black voters who could hold the key in a close election."

34. Defendant Wilder's pre-debate statements about supporting one or the other of the Republican or Democratic candidates raised additional speculation about which of the two candidates he would support and prompted a telephone call from President William Jefferson Clinton a few hours before Debate Virginia was held (which was reported widely in the press) urging Wilder to endorse the Democratic candidate, Donald S. Beyer, Jr., for Governor.

35. Prior to the debate, the defendant Wilder met privately with the Republican candidate for Governor, James S. Gilmore, III, who is reported to have said: "I'd very much like to have Governor Wilder's support. I think he's got considerable influence."

36. At the beginning of Debate Virginia, the defendant Trani welcomed debate participants to VCU.

37. At the end of the debate, the defendant Wilder thanked the defendant VCU "for providing this forum" and said, "more Virginians heard this debate than any debate, in my judgment, in Virginia's history."

38. The debate was held before an audience of hundreds of invited guests, including prominent Virginians and the leaders of its media interests and was broadcast to most areas of the Commonwealth, including live broadcast over **the defendants** WRVA-AM ~~[radio Richmond,]~~ **and WNVT and** WINA-AM Charlottesville, WJYJ-FM Fredericksburg, WAGE-AM Leesburg, WFIR-AM Roanoke, WDBJ-TV Roanoke, WVEC-TV Norfolk,~~[WNVT-TV Fairfax,]~~ News Channel 8 Springfield, WWBT-TV Richmond, and taped showings aired on WCVE-TV Richmond, WHTJ-TV Charlottesville, WVPT-TV Harrisonburg, WMSY-TV Marion, WHRO-TV Norfolk,

WSBN-TV Norton, and WBRA-TV Roanoke.

The Modern Political Campaign and Limited and Inadequate Channels of Communication

39. Although Ms. DeBauche is the Chairman of the Virginia Reform Party, whose candidate for the Presidency in the 1992 election won approximately ~~[20%]~~ **13.6%** of the statewide vote, **11% in 1994** and in 1996, approximately 6% of the statewide vote, Ms. Debauche has not previously run for political office and her name identification with voters is nominal.

40. James S. Gilmore, III, and Donald S. Beyer, Jr., the Republican and Democratic Party candidates for Governor, have been previously elected to the state-wide offices of Attorney General and Lt. Governor, respectively, and have a high name identification rating with voters.

41. Candidates who have run for, and/or who currently occupy, statewide office, have a built-in advantage to command the attention of "free media," (that is media coverage which is not paid for) and other benefits of office, whereas candidates who have not previously held or run for state-wide office do not share these advantages.

42. One of the traditional and most effective means of achieving identification and getting across a candidate's unique campaign message and viewpoint is the candidate debate.

43. To be successful in communicating Virginia Reform Party ideas and shaping the campaign debate, if not her candidacy, Ms. DeBauche's appearance in debates with other

candidates is an important weapon in realizing the objectives of name identification, issue identification and conveying her unique viewpoint on important issues, as well as persuading voters and the media. There are no similar alternate channels of speech which are available to achieve this goal. Any alternate channel of speech is inadequate for this task.

44. Debate Virginia was a uniquely valuable and important means of communications essential to advance Ms. DeBauche's campaign. Without participation in the debate, Ms. DeBauche could not succeed in her plan to successfully establish name recognition, to affect the candidate focus on the issues, to present her unique viewpoints on the issues and to influence the outcome of the election.

45. In the last two Virginia Presidential elections and the last Virginia Senatorial election, third party and/or independent candidates received approximately 20%, 6% and 11%, respectively, of the statewide vote and significantly influenced the outcome of the elections.

45a. But for the actions of the defendants in gerrymandering the 1997 election results by marginalizing plaintiff and preventing her from raising her name recognition, she would have received at least 15% of the statewide vote in the election.

Ms. DeBauche's Requests to Participate in Debate Virginia

46. Between September 15, 1997 and October 1, 1997, Ms. DeBauche called defendant Wilder at his VCU telephone number identifying herself, leaving a recorded message requesting to participate in Debate Virginia and

requesting that defendant Wilder to return her call. Ms. DeBauche received no response from defendant Wilder.

47. Between September 15, 1997 and October 1, 1997, Ms. DeBauche called defendant Wilder at his personal telephone number identifying herself, leaving a recorded message requesting to participate in Debate Virginia and requesting that defendant Wilder to return her call. Ms. DeBauche received no response from defendant Wilder.

48. Between September 15, 1997 and October 6, 1997, other Central Committee members of the Virginia Reform Party called the defendant Wilder at his VCU telephone number identifying themselves and leaving recorded message requesting that Ms. DeBauche, as the Virginia Reform Party candidate, participate in Debate Virginia and requesting that defendant Wilder to return their calls. The defendant Wilder did not respond to these requests.

49. Between September 15, 1997 and October 6, 1997, Ms. DeBauche and other Central Committee members of the Virginia Reform Party called the VCU 1-800 number established by defendant VCU for Debate Virginia, identifying themselves and leaving recorded message requesting that Ms. DeBauche, as the Virginia Reform Party candidate, participate in Debate Virginia. The defendant Wilder did not respond to these requests.

50. On October 1, 1997, Ms. DeBauche sent an e-mail message to the address shown on the defendant VCU's Debate Virginia Worldwide Web site (www.vcu.edu/debate) identifying herself, indicating that she had repeatedly made calls to the defendant Wilder to be included as a participant in Debate Virginia and requesting once again to participate in Debate

Virginia. None of the defendants responded to her e-mail.

51. On October 6, 1997, Debate Virginia was held as planned with only Messrs. Gilmore and Beyer as participants, excluding Ms. DeBauche from the debate.

51a. On or about October 21, 1997, Ms. DeBauche made a written demand to the defendants VCU and Trani that they schedule a Gubernatorial debate including all three candidates before the November 4, 1997, election to remedy the damage done to MS. DeBauche and her Party and its members, which demand was rejected by the defendants VCU and Trani on or about October 24, 1997.

The Defendants' Policies

52. By policy, custom and/or practice, the **state actor** defendants have adopted an unlawful policy vesting standardless discretion in government officials and non-governmental persons **or entities acting under color of state law** to regulate access to, and expression in, designated public forums involving public service activities like Debate Virginia and to deny precious First Amendment rights and the Equal Protection of the Law based upon personal predilections and whim, and/or have unlawfully permitted such officials and persons **or entities** to make unlawful distinctions based on the content or viewpoint of speech.

53. By policy, custom and/or practice, the **state actor** defendants have unlawfully breached and/or delegated their affirmative constitutional duty to promulgate constitutional regulations for access to, and expression in, designated public forums involving public service activities like Debate Virginia and to deny precious First Amendment rights and the Equal

Protection of the Law by vesting standardless discretion in government officials **and/or nongovernmental persons or entities acting under color of state law** to deny precious First Amendment rights and the Equal Protection of the Law based upon personal predilections and whim, and/or by permitting such officials **and/or persons or entities** to make unlawful distinctions based on the content or viewpoint of speech, impermissibly requiring governmental officials **and/or such persons or entities** to make judgments that they are not otherwise qualified or should be permitted to make in a democratic society.

54. By policy, custom and/or practice, the **state actor** defendants have established a licensing system for access to, and expression in, designated public forums involving public service activities like Debate Virginia in a manner that constitutes a prior restraint on freedom of speech that, in the absence of narrowly drawn, reasonable and definite standards, and sufficiently adequate and definite procedural safeguards, is constitutionally invalid.

55. By policy, custom and/or practice, the **state actor** defendants have acted unlawfully to deny Ms. DeBauche's rights to Free Speech and Equal Protection of the law by expending substantial state resources to promote the views of selected political candidates, while at the same time excluding such expenditures with reference to other candidate views for the same office, advancing impermissible partisan objectives in the democratic process and invidiously discriminating among the candidates' core political speech which is entitled to the highest degree of protection from government interference and intrusion.

56. The actions of the defendants with respect to Ms.

DeBauches's request for access, participation and expression in Debate Virginia as a candidate for Governor were taken pursuant to the VCU's policies, customs and/or practices and were authorized, sanctioned, implemented, permitted and ratified by the defendants or their agents functioning at a policy making level.

The Public Forum Nature of Debate Virginia

57. Ms. DeBauche's request to participate in Debate Virginia as a candidate for Governor of Virginia is clearly within the confines of protected speech under the First Amendment.

58. The ~~[defendant VCU has]~~ **defendants** intentionally designated Debate Virginia as a designated and/or limited public forum.

59. The defendants have in practice permitted the other two state-qualified candidates for Governor, Messrs. Gilmore and Beyer, to participate in Debate Virginia and have used extensive **private and** taxpayer-financed state resources in support of their appearances in Debate Virginia.

60. Ms. DeBauche's participation in Debate Virginia would have been compatible with the uses of the Debate Virginia forum and the nature of the property comprising Debate Virginia is compatible with such expressive activity.

61. The message and the various media constituting the entirety of Debate Virginia through which Ms. DeBauche sought to communicate her message was and is unique and, in the exclusion of candidate DeBauche from that forum, alternate methods were and are otherwise inadequate and unavailable for communicating her message to the general public.

62. The defendants have unlawfully excluded Ms. DeBauche from presenting her viewpoints on important 1997 election issues in Debate Virginia based on content or viewpoint while permitting and affirmatively assisting Messrs. Gilmore and Beyer to present their viewpoints freely without regard to content or viewpoint. **They will do so in future elections to favor other majority party candidates to the detriment of the candidates of the Party.**

63. Having opened Debate Virginia as a public forum in which duly qualified candidate for Governor of Virginia express their views or comments through spontaneous answers to questions posed to each candidate for that office, the defendants and their agents have discriminated against Ms. DeBauche, and censored protected speech on the basis of the content and/or viewpoint of her speech.

64. Even if Debate Virginia was deemed to be a non-public forum, the defendants and their agents nevertheless have discriminated against Ms. DeBauche without a reasonable basis and have unlawfully discriminated against her
based on her viewpoint and/or otherwise have adopted a policy that is vague and overbroad and contains no definite standards to guide determinations as to permitted speech or otherwise to limit the abuse of official discretion.

Collateral Allegations

65. The defendants and their agents, under color of law and of the policies, customs and practices of defendant VCU have arbitrarily and capriciously discriminated against Ms. DeBauche and her ideas, concepts and viewpoints, in violation of her rights to free speech and equal protection of the law guaranteed by the First and Fourteenth Amendments to the United States Constitution.

66. The willful and wanton actions of the defendants indicate a reckless or callous disregard of, or deliberate indifference to, the rights of others as to constitute gross negligence.

67. The actions of the defendants violate clearly established constitutional rights of which a reasonable person would have known and constitute an abuse of government power.

68. The actions of the defendants in enforcing the policies and rules and regulations of VCU were done either with the active participation, knowledge and/or acquiescence of the defendants, or otherwise in breach of their duty to be aware of all actions taken in connection with the enforcement of said policy and regulations.

69. ~~[Upon information and belief,]~~ **The** defendants will not permit Ms. DeBauche or ~~[others similarly situated persons]~~ **other statewide Party candidates** to participate in any future Gubernatorial ~~[debate]~~ **or statewide office debates sponsored, co-sponsored,** planned, promoted, managed and/or executed by **either WRVA, WNVT and affiliates or** VCU, either now or in the future. **All the defendants will either individually or jointly sponsor, plan, promote manage or hold statewide debates in the future from which candidates of the Party will be excluded and to which only Democratic and Republican candidates will be invited.**

70. As written and as applied, the defendants' policies, customs and/or practices violate Ms. DeBauche's right to free speech under the First Amendment and her right under the Equal Protection Clause of the Fourteenth Amendment, which are entitled to the fullest measure of constitutional

protection.

71. As written and as applied, the defendants' policies, customs and/or practices favor the speech of candidates of the major political parties over speech of candidates from minority political parties and thereby invert cherished First Amendment values promoting dissent, an open electoral process, and free and uninhibited public debate of political questions.

72. As written and as applied, the defendants' policies, customs and/or practices are unconstitutionally vague and overbroad in that they do not properly inform duly qualified candidates why access to Debate Virginia and similar events is restricted and/or prohibited, impermissibly allowing the defendants to impose their own predilections in determining what speech is permissible and inhibit the exercise of First Amendment rights.

73. As written and as applied, the defendants' policies, customs and/or practices engage in impermissible content discrimination among different forms of social, economic, philosophical and political speech.

74. As written and applied, the defendants' policies, customs and/or practices deny free speech in a designated First Amendment forum.

75. As written and as applied, the defendants' policies, customs and/or practices do not further any important, substantial or compelling governmental interests.

76. As written and as applied, the restrictions imposed by the defendants' policies, customs and/or practices

are greater than necessary to further any governmental interest asserted.

77. As written and as applied, the primary effect of defendants' policies, customs and/or practices is to inhibit certain forms of political speech.

78. As written and as applied, the defendants' policies, customs and/or practices constitute an unlawful prior restraint on speech.

79. The aforesaid actions of the defendants were intentional, were taken in bad faith and under color of State law at a time when they knew or should have known that their actions would deprive Ms. DeBauche **and members** of her **Party of their** settled legal rights.

80. The aforesaid actions of the defendants were authorized, sanctioned, implemented and ratified by officials functioning at a policy making level.

81. The constitutional deprivations herein are "fairly attributable" to the state.

82. The defendant Wilder **and the private corporate defendants** may fairly be said to be ~~[a]~~ state ~~[actor]~~ **actors** because ~~[he]~~ **they** worked jointly on Debate Virginia with the defendants VCU and Trani and/or their respective agents and received significant aid and assistance from the defendant VCU as an instrumentality of the Commonwealth of Virginia in the execution of Debate Virginia~~[, the defendant Wilder's]~~. **Their** conduct is otherwise attributable to the defendant VCU.

83. The defendant Wilder ~~[has been a willful participant]~~ **and the private corporate defendants have been willful participants** in joint action with the defendant VCU and/or its agents as state actors and, as ~~[a]~~ private ~~[person, he has]~~ **persons, they have** jointly engaged with state officials in the challenged actions, and with them ~~[he is]~~ **they are** acting under color of law.

84. The defendant Wilder **and the private corporate defendants** acted with the intent to exclude Ms. DeBauche from participation as a candidate in Debate Virginia in that ~~[he]~~ **they** had a subjective appreciation that ~~[his]~~ **their** acts would deprive Ms. DeBauche of her constitutional rights and knew or should have known of the illegality of such actions and that this would deprive her of settled legal rights.

85. As a direct and proximate result of the actions of the Defendants, Ms. DeBauche has suffered compensatory damages and other injury and pecuniary loss and has been denied her constitutional rights.

86. Ms. DeBauche has no plain, adequate or complete remedy at law to redress these wrongs, and this suit for declaratory and injunctive relief is the only means of securing adequate relief. Ms. DeBauche ~~[is]~~ **and the Party and its members are** now suffering and will continue to suffer irreparable injury from defendants' policies, practices, customs and usage as set forth herein until enjoined by the court.

87. As a direct and proximate result of the actions of the defendants, Ms. DeBauche has been denied her constitutional rights.

COUNT I

88. Ms. DeBauche incorporates by reference herein the allegations contained in paragraphs 1 through ~~[85]~~ **87**.

89. The actions of the defendants have violated Ms. DeBauche's**, the Party's and its members'** constitutional rights to free speech **and freedom of association** as guaranteed by the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983.

COUNT II

90. Ms. DeBauche incorporates by reference herein the allegations contained in paragraphs 1 through ~~[85]~~ **87**.

91. The actions of the defendants have violated Ms. DeBauche's**, the Party's and its members'** constitutional rights to equal protection of the law protected by the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §1983 by unlawfully discriminating on the basis of the content or viewpoint of her speech.

COUNT III

92. Ms. DeBauche incorporates by reference herein the allegations contained in paragraphs 1 through ~~[85]~~ **87**.

93. Upon information and belief, as of the date of Debate Virginia, the Virginia Gubernatorial Election was a virtual dead heat between Messrs. Gilmore and Beyer.

94. Upon information and belief, the defendant Wilder and the defendant VCU and/or its agents the Center for Public Policy and Dr. Robert Holsworth, are sophisticated political analysts and/or operatives who understand the political

and electoral process.

95. Upon information and belief, the defendant Wilder ~~[and]~~, the defendant VCU and/or its agents the Center for Public Policy and Dr. Robert Holsworth, **and the private corporate defendants** are privy to the latest polling data for candidates running for the Office of Governor of Virginia.

96. Upon information and belief, the defendant Wilder has stated his intention to inform voters in the Commonwealth of Virginia what candidate he intends to vote for the Office of Governor of Virginia.

97. Upon information and belief, the defendant Wilder ~~[and]~~, the defendant VCU and/or its agents the Center for Public Policy and Dr. Robert Holsworth, **and the private corporate defendants** were aware that if Ms. DeBauche had been a participant in Debate Virginia, she stood in a better position to reach and persuade more voters to vote for her, and to present her unique viewpoint on the issues, thereby distorting the electoral process and affecting the outcome of the election between the other two candidates.

98. Upon information and belief, the defendant VCU ~~[and Wilder]~~**, Wilder and the private corporate defendants** intentionally excluded Ms. DeBauche from Debate Virginia in order to promote the interests of the Republican and Democratic candidates for Governor and thereby to influence unlawfully the outcome of the election.

99. The aforesaid actions of the defendants have violated Ms. DeBauche's**, the Party's and its members'** constitutional rights to equal protection of the law protected by the Fourteenth Amendments of the United States Constitution

and 42 U.S.C. §1983 by unlawfully classifying the duly-qualified and -balloted candidates for Governor of Virginia without a reasonable or compelling state interest and in a manner that failed to satisfy constitutional requirements.

COUNT IV

100. Ms. DeBauche incorporates by reference herein the allegations contained in paragraphs 1 through ~~[97]~~ **99**.

101. The actions of the defendants have violated Ms. DeBauche's**, the Party's and its members'** Constitutional rights protected by the Ninth and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. §1983, as well as related provisions found in the United States Constitution.

REQUESTS FOR RELIEF

102. Ms. DeBauche seeks a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. Sections 2201-2202, declaring the acts of the defendants relative to the exclusion of Ms. DeBauche from Debate Virginia a violation of Ms. DeBauche's constitutional rights, awarding Ms. DeBauche nominal, compensatory and punitive damages from the **private corporate defendants and** defendants Trani and Wilder in their individual capacities, and granting a mandatory injunction commanding the defendants, their officers, employees, agents, successors or assigns, etc., to enjoin the defendants' interference with her exercise of her constitutional rights in the future.

103. Ms. DeBauche is entitled to her reasonable attorney's fees and costs.

WHEREFORE PLAINTIFF PRAYS:

1. That the Court declare the acts of the defendants relative to the exclusion of Ms. DeBauche from Debate Virginia a violation of Ms. DeBauche's**, the Party's and its members'** constitutional rights and require the defendants, their officers, agents, servants, employees, attorneys, successors or assigns, and those persons in active concert or participation with them, to honor Ms. DeBauche's First Amendment rights of free speech, and her Ninth and Fourteenth Amendment rights to equal protection of the law and enjoin the defendants' interference with her exercise of those rights.

2. Issue a declaratory judgment declaring the ~~[defendant VCU's]~~ **defendants'** policies, customs and practices and/or action taken pursuant thereto or otherwise, unconstitutional as written and as applied with reference to any future statewide political candidacy of Ms. DeBauche **or any candidate of the Party**.

3. That upon final hearing in this cause, the Court review and consider the results of the election for Governor of the Commonwealth of Virginia and whether other parties should be joined in this action to respond as to whether the results of the election should be invalidated and/or other equitable relief should be granted based upon the undue influence and political partisanship of the ~~[defendant VCU]~~ **defendants** in the electoral process and its effect on the outcome of the election**, including but not limited to declaring that plaintiff would have received 15% of the statewide vote and directing other parties so joined, including without limitation the State Board of Elections, or other appropriate entity to certify candidates selected by the Virginia Reform Party from its membership to be placed on the ballot in the next Virginia gubernatorial election and other appropriate relief**.

4. That upon final hearing in this cause a mandatory injunction issue commanding the defendants, their officers, agents, servants, employees, successors or assigns, to prevent the enforcement of the ~~[defendant VCU's]~~ **defendants'** policies, customs and practices, as written or applied, and/or action taken pursuant thereto or otherwise, from excluding Ms. DeBauche and any other future ~~[political]~~ **Party** candidate from any debate **sponsored, co-sponsored,** planned, promoted, managed and/or executed by **any of** the ~~[defendant VCU]~~ **defendants**.

5. That this Court direct the defendants to instruct all of their subordinate officers, agents, employees, servants and those persons in active concert or participation with them believed to be planning to participate in the activities enumerated above not to engage or participate in any such activities enjoined in paragraphs 1, 3 and 4 above.

6. Require the **private corporate defendants and** defendants Trani and Wilder to pay Ms. DeBauche nominal damages.

7. Require the **private corporate defendants and** defendants Trani and Wilder to pay Ms. DeBauche compensatory damages.

8. Require the **private corporate defendants and** defendants Trani and Wilder to pay Ms. DeBauche punitive damages.

9. Require the defendants to pay Ms. DeBauche's costs and reasonable attorney's fees.

10. That the court grant such further and general relief as to which Ms. DeBauche may be entitled.

Dated ~~[October 15]~~: **November 26**, 1997.

SUE HARRIS DEBAUCHE

By:_____

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CERTIFICATE OF SERVICE

I, James J. Knicely, Esquire, certify that the foregoing FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES AND INJUNCTIVE RELIEF was mailed first class, postage prepaid, to Richard Cullen, Attorney General, Office of the Attorney General, Supreme Court Building, 6th & Main Streets, Richmond, Virginia 23219, and to L. Douglas Wilder, c/o WRVA-AM, 200 North 22nd Street, Richmond, Virginia 23223, on this 26th day of November, 1997.

_____

James J. Knicely, Esquire